(16,443.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 268.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES HABER ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
CHARLES HABER *et al.*, Defendants in Error. } No. 10003.

Be it remembered that on the 8th day of October, 1894, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error to said supreme court, and attached thereto and made a part thereof a "case made," containing the record of the trial of said cause in the district court of Lyon county; which petition in error and case made are in words and figures as follows, to wit:

2 10003.

CHARLES HABER
versus
MO., KAN. & TEX. R'Y CO. *et al.* } # 8499.

Filed May 12th, 1894.

M. O. STARR, *Clerk.*

Filed Oct. 8th, 1894.

C. J. BROWN,
Clerk Sup. Court.

3 In the Supreme Court of the State of Kansas.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Plaintiff in Error,
against
CHARLES HABER, H. R. SCROGGINS, JANE JONES, E. T. WHITE, Jas. C. Farrington and C. J. Lantry, Partners as Farrington & Lantry; John P. Perrier, Dr. H. J. Fuller, H. A. Bolz, A. Murphy, D. J. Lewis, J. G. Hughes, Charles McKee, J. G. Rumford, Patrick McCormick, John Scroeder, R. Funk, Joseph Wagner, Deitrich Fox, Mathias Maurin, Henry Merker, G. E. Bodine, Mary McClelland, Joseph Kuhlman, Joseph Bratt, D. S. Starr, L. W. Olstrom, F. G. Soule, Widow Smith, Mrs. L. B. Hull, Henry Giger, Louis Heitzman, Harry Stuttle, John Middaugh, Edward Jenkins, J. P. Rossillan, L. L. McKee, Christ Kruger, A. Kinne, W. H. Watkins, J. Dunn, Littler Bros., John D. Bolton, Isaac Hawbekeer, Adam Bitler, T. M. Robinson, Matthew Sweiger, Joseph Strutzel, John Langley, Michael Janker, Harry Soule, John Hicks, S. P. Reaser, A. G. Shepard, J. F. Stratton, John Stottler, C. W Stottler, S. A. Stottler, M. J. Collard, Carson & Osborne, H. C. Jackson, W. H. Zink, P. C. Zink, T. E. Welch, George E. Welch, A. A. Willson, J. A. Thompson, George Terrell, Guy Slead, D. B. Stigner, W. A. Pease, George Parker, Peter Schlisher, John Schlisher, Marshal Meal, J. N. Nurmburg, G. P. Jones, Theodore Hurtig, G. O.

Hughes, W. T. Hite, W. H. Hickox, James Hutton, John W. Hughes, J. W. Hock, John Hock, D. H. Gard, E. Fullen, George Elliott, R. M. Elliott, J. L. Stratton, Lawrence Dresher, Elizabeth Davis, J. C. Cooley, G. T. Collins, G. C. Bender, John Bricker, V. G. Baysinger, Winnie Baysinger, D. S. Baysinger, C. N. Buck, S. C. Bixler, Herman Brier, John Brier, Adolph Brier, W. B. Johns, Mary Westfall, Alice Stenberger, Amanda J. Jones, Mrs. V. J. Hale, Mary Conway, John Patch, John H. Ferran, Wm. Nicholas, H. R. Williams, J. W. Ketchem, H. A. Taylor, Timothy Murphy, David McKee, Robert North, Wesley Roberts, George Ward, L. Y. Cooper, Hannah Bowers, Herman Bohn, P. Montgomery, P. Montgomery, acc't of J. W. Montgomery; A. T. Johnson, Alfred Marley, Anna Hughes, Otto Haber, Mrs. Martha Smith, W. C. Phillips, Phillip Davis, John Maddox, Owen Hughes, J. J. Rumford, E. W. Everett, L. A. Wright, A. B. Holforty, L. B. Ames, S. F. Jones, Wm. Dunlay, F. M. Nine, L. O. Olson, John Furnas, Furnas and Martindale, J. W. Van Cleve, J. C. Van Cleve, Dr. Gunkle, S. F. Jones, W. F. Dunlop, George Ward, H. H. Henry, Eureka Springs Cattle Company, Dr. Conckle, August Richeidt, Defendants in Error.

Petition in Error.

The said Missouri, Kansas & Texas Rwailway Company, plaintiff in error, complains of the defendants in error, for that the said defendants in error, at the December, 1893, term of the district court of Lyon county, Kansas, and each of them, recovered a separate judgment by the consideration of said court against the plaintiff in error in a certain action then pending in said court, wherein the said Charles Haber was plaintiff and the plaintiff in error and the codefendants in error of said Charles Haber were defendant-; a copy of the record of the judgment and proceedings in which case, duly certified, is hereto attached, marked "Exhibit A," and made a part hereof for reference.

And the said Missouri, Kansas and Texas Railway Company, as plaintiff in error, avers there is error in said record and proceedings in this, to wit:

1. The court erred in not sustaining the motion of the plaintiff in error (one of the defendants below) to make the petition of the plaintiff and the cross-petitions of the defendants, claiming affirmative relief against plaintiff in error, more definite and certain.

4 2. The said court erred in overruling said motion to make said petition and said cross-petitions more definite and certain.

3. The said court erred in overruling the motion of the plaintiff in error (one of the defendants below) to dismiss the action as to it upon the ground of a misjoinder and excess of parties defendant claiming affirmative relief against the defendant The Missouri, Kansas and Texas Railway Company.

4. The said court erred in not sustaining the motion of the plaintiff in error (one of the defendants below) to dismiss said action because of misjoinder and excess of parties defendant claiming affirm-

ative relief against the plaintiff in error, The Missouri, Kansas and Texas Railway Company.

5. The said court erred in overruling the motion made by the plaintiff in error (one of the defendants below) to dismiss each and all of the cross-petitions of the defendants in this case claiming affirmative relief against the Missouri, Kansas and Texas Railway Company because of misjoinder and excess of parties defendant.

6. The said court erred in not sustaining the motion made by the plaintiff in error (one of the defendants below) to dismiss each and all of the cross-petitions of the defendants in this case claiming affirmative relief against the Missouri, Kansas & Texas Railway Company, upon the ground of misjoinder and excess of parties defendant.

7. The said court erred in not sustaining the objection made by the plaintiff in error (one of the defendants below) to the introduction of any testimony under the petitions.

8. The said court erred in overruling the objection made by plaintiff in error (one of the defendants below) to the introduction of any testimony under the petitions.

9. The said court erred in not dismissing the case as to The Missouri, Kansas and Texas Railway Company, plaintiff in error (one of the defendants below), because of the misjoinder and excess of parties defendant.

10. The said court erred in permitting any testimony to go to the jury upon behalf of the plaintiff over the objection of the plaintiff in error (one of the defendants below).

11. The said court erred in not dismissing all and every one of the cross-petitions filed by the defendants claiming affirmative relief against the plaintiff in error, The Missouri, Kansas and Texas Railway Company (one of the defendants below).

12. The said court erred in overruling the objections made by the plaintiff in error (one of the defendants below) to the testimony of Francis Brogan.

13. The said court erred in admitting the testimony of Francis Brogan over the objection of the plaintiff in error (one of the defendants below).

14. The said court erred in permitting Francis Brogan to testify regarding conversations had with Mr. Taylor, the purchasing agent of the Missouri, Kansas and Texas Railway Company; also regarding conversations had with Mr. Williams, live-stock agent of the Missouri, Kansas and Texas Railway Company.

15. The said court erred in permitting witness Hunter to testify to conversation had between himself and Mr. Worth, trainmaster of the Missouri, Kansas and Texas Railway Company, after the delivery of the cattle at Hartford, Kansas.

16. The said court erred in permitting witness Hunter to testify concerning the condition of the cattle and what he observed of them, over the objection of the plaintiff in error (one of the defendants below).

17. The said court erred in admitting the testimony of D. G. Franks.

18. The said court erred in admitting the testimony of Fred.

Smart, which was objected to by plaintiff in error (one of the defendants below).

19. The said court erred in the admission of testimony showing the situation and location of the ranch of said Hosier Brothers, which was objected to by said plaintiff in error (one of the defendants below).

20. The said court erred in admitting any testimony in support of the separate claims of defendants and cross-petitioners respectively claiming affirmative relief against the Missouri, Kansas and Texas Railway Company.

21. The said court erred in not sustaining the objection made by the plaintiff in error (one of the defendants below) to the admission of any testimony in support of the separate claims of the defendants and cross-petitioners respectively claiming affirmative relief against the Missouri, Kansas and Texas Railway Company.

22. The said court erred in the admission of irrelevant testimony over the objection of plaintiff in error (one of the defendants below).

23. The said court erred in not sustaining the objection made by the plaintiff in error to irrelevant testimony offered in support of the claim of plaintiff and in support of the claim made by defendants and cross-petitioners respectively claiming affirmative relief against the Missouri, Kansas and Texas Railway Company.

24. The said court erred in the admission of any testimony in support of the separate claims made by the defendants and cross-petitioners respectively claiming affirmative relief against the Missouri, Kansas and Texas Railway Company.

25. The said court erred in not sustaining the demurrer interposed by the plaintiff in error to the testimony in support of the petition of the plaintiff and in support of each and all of the cross-petitions filed by the defendants respectively, claiming affirmative relief against the Missouri, Kansas and Texas Railway Co.

26. The said court erred in overruling said demurrer.

27. The said court erred in refusing to permit the plaintiff in error, one of the defendants below, to read the circular issued by the Hon. Jeremiah M. Rusk, Secretary of the Department of Agriculture, establishing a quarantine line in the State of Texas.

28. The said court erred in sustaining the objection made by the plaintiff and cross-petitioners respectively to the introduction of said circular establishing said quarantine line.

29. The said court erred in refusing to permit the plaintiff in error, one of the defendants below, to exhibit and read to the jury as a part of its testimony the permits issued by the live-stock sanitary commission of the State of Kansas.

30. The said court erred in sustaining the objection made by the plaintiff and cross-petitioner- to the introduction of said permits in evidence.

31. The said court erred in refusing to permit the plaintiff in error (defendant below) to show that it had complied with the sanitary rules and regulations of the Department of the Bureau of Animal Industry then in force, as shown by the said circular of

the Hon. Jeremiah M. Rusk, Secretary of the Department of Agriculture.

6 32. The said court erred in refusing to permit the plaintiff in error (one of the defendants below) to show to the jury that Hosier Brothers had obtained permission from the State board of live-stock sanitary commissioners to bring in these identical cattle over the line of the M., K. and T. R'y Company at this time.

33. The said court erred in refusing to give to the jury each special instruction requested by the plaintiff in error (one of the defendants below).

34. The said court erred in not giving to the jury each and every one of the special instructions requested by the plaintiff in error (one of the defendants below).

35. The said court erred in each and every instruction given to the jury.

36. The said court erred in not instructing the jury to find for the plaintiff in error (one of the defendants below).

37. The said court erred in receiving the several verdicts over the objection of the plaintiff in error (one of the defendants below).

38. Said court erred in sending the jury back to reconsider and change their verdict as to the claim of the codefendants and cross-petitioners, The Eureka Springs Cattle Company, Olson Brothers, and E. W. Everett.

39. The said court erred in sending the jury back to find verdict in favor of the defendants and cross-petitioners The Eureka Springs Cattle Company, Olson Brothers, and E. W. Everett.

40. The said court erred in permitting the testimony in support of the claim of defendants and cross-petitioners Eureka Springs Cattle Company, Olson Brothers, and E. W. Everett to be read to the jury a second time, after they had returned their verdicts as to the other claims.

41. The said court erred in not sustaining the motion of the plaintiff in error, The Missouri, Kansas and Texas Railway Company, for judgment in its favor and against the plaintiff and each and all of the cross-petitioners claiming affirmative relief against it, notwithstanding the general verdict in favor of said parties.

42. The said court erred in overruling said motion for judgment so filed by the plaintiff in error (one of the defendants below) for judgment, notwithstanding said general verdicts.

43. The said court erred in overruling the motion of the plaintiff in error for a new trial.

44. The said court erred in not setting aside the verdict in favor of the plaintiff and in favor of each and all of the cross-petitioners respectively claiming affirmative relief against the Missouri, Kansas and Texas Railway Company.

45. The said court erred in not sustaining the motion of the plaintiff in error (one of the defendants below) for a new trial.

46. The said court erred in rendering judgment in favor of the plaintiff and in favor of each and all the cross-petitioners respectively claiming affirmative relief against the Missouri, Kansas and

Texas Railway Company for the amount of said verdicts respectively.

47. The said court erred in not rendering judgment in favor of the plaintiff in error, The Missouri, Kansas and Texas Railway Company, and against the plaintiff and each and all of the cross-petitioners claiming affirmative relief.

48. The said court erred in permitting the foreman of the jury to tamper with and amend the verdict of the jury in favor of J. W. Ketcham after the jury had been discharged and after motion for judgment and motion for new trial had been argued and overruled.

7 49. The said court erred in refusing to instruct the jury that the shipments of cattle were interstate commerce and controlled by the laws and regulations of the Department of Agriculture of the United States.

50. The court erred in giving instruction # 5 to the jury.

51. The court erred in instruction # 6 given to the jury.

52. The court erred in instruction # 7 given to the jury.

53. The said court erred in instruction # 8 given to the jury.

54. The said court erred in instruction # 9 given to the jury.

55. The said court erred in instruction # 10 given to the jury.

56. The said court erred in instruction # 10 given to the jury.

Wherefore plaintiff in error prays that said judgments and each of them be reversed and that it be restored to all things which it has lost thereby.

T. N. SEDGWICK AND
L. B. KELLOGG,
Attorneys for Plaintiff in Error.

(Filed Oct. 8th, 1894.
C. J. BROWN,
Clerk Sup. Court.)

8 STATE OF KANSAS, }
County of Lyon. }

In the District Court of said County.

CHARLES HABER, Plaintiff,
vs.

E. A. HOSIER and GEORGE B. HOSIER, Partners as Hosier Brothers; The Missouri, Kansas & Texas Railway Company; Francis Brogan, W. J. Brogan, and Joseph N. Brogan, Partners as Francis Brogan and Francis Brogan and Sons; Thomas E. Tutt; D. L. Jones and L. S. Jones, Partners as the D. L. Jones and Brother Live Stock Commission Co.; H. R. Scoggins, Jane Jones, E. T. White; Jas. C. Farrington and C. J. Lantry, Partners as Farrington and Lantry; John P. Perrier, Dr. H. J. Fuller, H. A. Bolz, A. Murphy, D. J. Lewis, J. G. Hughes, Charles McKee, J. G. Rumford, Patrick McCormick, John Schroder, R. Funk, Joseph Wagoner, Deitrich Fox, Mathias Maurin, Henry Merker, G. E. Bodine, Mary McClelland, Joseph Kuhlman, Joseph Bratt, D. S.

Starr, L. W. Olstrom, F. G. Soule, Widow Smith, Mrs. L. B. Hull, Henry Giger, Louis Heitzman, Harry Stuttle, John Middaugh, Edward Jenkins, J. P. Rossillan, L. L. McKee, Christ Kruger, A. Kinne, W. H. Watkins, J. Dunn, Littler Bros., John D. Bolton, Isaac Hawbecker, Adam Bitler, T. M. Robinson, Mathew Sweiger, Joseph Strutzel, John Langley, Michael Janker, Harry Soule, John Hicks, S. P. Reaser, A. G. Shepard, J. F. Stratton, John Stotler, C. W. Stotler, S. A. Stotler, M. J. Collard, Carson & Osborn, H. C. Jackson, W. H. Zink, P. C. Zink, T. E. Welch, George E. Welch, A. A. Willson, J. A. Thompson, George Terrell, Guy Slead, D. B. Stigner, W. A. Pease, F. George Parker, Peter Schlisher, John Schlisher, Marshall Meal, J. N. Nurmburg, G. P. Jones, Theodore Hurtig, G. O. Hughes, W. T. Hite, W. H. Hickox, James Hutton, John W. Hughes, J. W. Hock, John Hock, D. H. Gard, E. Fullen, George Elliott, R. M. Elliott, J. L. Stratton, Lawrence Dresher, Elizabeth Davis, J. C. Colley, G. T. Collins, G. C. Bender, John Bricker, V. G. Baysinger, Winnie Baysinger, D. S. Baysinger, C. N. Buck, S. C. Bixler, Herman Brier, John Brier, Adolph Brier, W. B. Johns, Mary Westfall, Alice Stenberger, Amanda J. Jones, Mrs. V. J. Hale, Mary Conway, John Patch, John H. Farren, Wm. Nicholas, H. R. Williams, J. W. Ketchem, H. A. Taylor, Timothy Murphy, David McKee, Robert North, Wesley Robe-ts, George Ward, L. Y. Cooper, Hannah Bowers, Herman Bohn, P. Montgomery; P. Montgomery, Acc't of J. W. Montgomery; A. T. Johnson, Alfred Marley, Anna Hughes, Otto Haber, Mrs. Martha Smith, W. C. Phillips, Phillip Davis, John Maddox, Owen Hughes, J. J. Rumford, E. W. Everett, L. A. Wright, A. B. Holforty, L. B. Ames, S. F. Jones, Wm. Dunlay, F. M. Nine, L. O. Olson, John Furnas, Furnas and Martindale, J. W. Van Cleve, J. C. Van Cleve, Dr. Gunkle, S. F. Jones, W. F. Dunlop, Geo. Ward, H. H. Henry, Eureka Springs Cattle Co., Dr. Conkle, August Richeidt, Defendants.

Case Made.

Be it remembered that heretofore, to wit, on December 4th, 1893, the above-named plaintiff filed in the district court of Chase county his amended petition in the above cause, of which the following is an exact copy, to wit:

(Title omitted.)

Amended Petition.

Comes now said plaintiff and, by leave of the court first had and obtained, makes additional parties defendant herein and files this his amended petition, and for cause of action complains of said defendants and alleges that said E. A. Hosier and George B. Hosier

9 are and for more than two years last past have been partners, doing business under the firm name and style of Hosier Bros.

That the Missouri, Kansas and Texas Railway Company is

and for more than ten years last past has been a corporation duly organized under and by virtue of the laws of the State of Kansas and for two years last past has owned and operated a railroad from Fort Worth, Texas, to the city of Hartford, in Lyon county, Kansas, and has kept and keeps an office and depot at said Hartford, Kansas; that said Francis Brogan, W. J. Brogan, and Joseph N. Brogan are and for 15 months last past have been partners as above alleged.

That said D. L. Jones and L. S. Jones are and for more than one year last past have been partners under the firm name and style of the D. L. Jones and Bros. Live Stock Commission Co.

That ever since April 1st, 1892, said plaintiff has resided in Lyon county, Kansas, and then and there kept and owned 49 head of steers, cows, heifers, and calves, all healthy, native, acclimated, and domestic, of the actual value of $2,000.00.

That the defendants Hosier Brothers owned and kept in the State of Texas 2,300 head of wild, undomesticated Texas cattle, and at a point south of the 27th parallel of north latitude, and all of said cattle were afflicted with Texas splenic or Spanish fever and liable to and capable of communicating said disease to any of the native cattle of Kansas; that between April 1st and July 15th, 1892, said defendants, Hosier Bros., The Missouri, Kansas and Texas Railway Company, and Francis Brogan, W. J. Brogan, and Joseph N. Brogan, kept, shipped, transported, drove, and brought said 2,300 head of Texas cattle from a point in Texas south of the 37th parallel of north latitude into the State of Kansas, in violation of an act of the legislature of the State of Kansas entitled "An act for the protection of cattle against contagious diseases" and known as chapter 161 of the Laws of 1881 and acts amendatory thereof and supplemental and additional thereto; that, in violation of said act, the said defendants last named did, within the time last aforesaid, keep, ship, transport, and drive the aforesaid Texas cattle into the State of Kansas from the aforesaid point to Hartford, Kansas, and from Hartford aforesaid through the county of Lyon and into the county of Chase, in said State of Kansas, and kept, drove, and caused to be kept and driven the said Texas cattle upon the same highway, range, common, and pasture with said cattle of this plaintiff. Said Texas cattle then had the disease known as the Texas splenic or Spanish fever and were liable and capable of communicating Texas splenic or Spanish fever to the domestic cattle of the State, and before said cattle were as aforesaid shipped, transported and driven, and kept said defendant-, Hosier Bros., The Missouri, Kansas and Texas Railway Company, and Francis Brogan, W. J. Brogan, and Joseph N. Brogan, had knowledge and were put upon dutiful inquiry and had reason to know that said Texas cattle so kept, shipped, transported, and driven were of a kind capable of communicating and liable to communicate and impart said disease to the domestic cattle of this State and to the aforesaid cattle of this plaintiff, and said Texas cattle so kept, shipped, transported, and driven did give, communicate, and impart said disease to all the aforesaid cattle of this plaintiff, so that they became and were so infected with said disease

that they sickened and died, and said plaintiff was compelled to and did pay out large sums of money and spent much time in caring for, feeding, treating, and trying to heal and cure said cattle, in the sum of $350.00, and in burying them to protect himself and the health of the community, in the sum of $150.00, to the total damage to this plaintiff of $2,500.00.

Said Texas cattle which communicated said disease were as aforesaid driven by the said first-named defendants, Hosier Bros., The Missouri, Kansas and Texas Railway Company, and said Brogans, from Hartford, in said Lyon county, Kansas, to a large ranch owned and kept by said Brogans in the southeast corner of said Chase county, Kansas, where said cattle were kept by said defendants last named until taken and there held in quarantine by the sheriff of said county, who was so holding them according to law at the commencement of this suit, and thereafter, by agreement of all of the parties and upon proper showing, the said court duly appointed T. J. Acheson as receiver in this suit, who took possession of said cattle from the sheriff so holding them in quarantine, and thereafter, by consent of all of the parties in interest and upon the order of said court duly made, said receiver sold said cattle and now has instead thereof the money and proceeds received from said sale.

Said plaintiff further says that said defendants, Thomas E. Tutt and The D. L. Jones and Brother Live Stock and Commission Company, pretend to have some claim or lien upon or interest in the fund in the hands of such receiver by virtue of chattel mortgages, but this plaintiff avers that each said claim is inferior and subordinate to his claim herein.

Said plaintiff further says that all the other said defendants thereafter named in the title to this cause have an interest in and claim upon the said fund becauses of losses of cattle sustained by them because of said disease being communicated to their cattle by the Texas cattle above mentioned.

This plaintiff claims a lien upon the fund in the hands of said receiver because of the facts above pleaded and given by the statutes of Kansas above referred to.

Wherefore this plaintiff demands judgment against said defendants, Hosier Brothers, The Missouri, Kansas and Texas Railway Company, Francis Brogan, W. J. Brogan, and Joseph N. Brogan, in the sum of $3,000.00, together with the costs of this suit, and that the same may be adjudged and decreed a lien upon the aforesaid fund prior and superior to any claim made by said Thomas E. Tutt and the D. L. Jones and Brother Live Stock Commission Company, and plaintiff prays for all other, further, and proper relief.

J. JAY BUCK,
E. W. CUNNINGHAM,
Attorneys for Plaintiff.

Farrington and Lantry, mentioned as defendants in the title to the above-amended petition, were residents of Chase county, Kansas. The cattle of Hosier Brothers that it was claimed had communicated

Texas fever were at the time of the filing of the original petition and again at the time of the filing of the above-amended petition in what was known as the Brogan pasture, in Chase county, Kansas, and were at the time of filing the amended petition in the possession of one T. J. Acheson, who had been appointed by the district court of Chase county, Kansas, as receiver for the purpose of taking possession of said cattle and selling the same and holding the proceeds for distribution in such manner as the court should direct.

The above petition differs from the original petition in this, that it makes the Missouri, Kansas and Texas Railway Company a party defendant, and alleges that the Hosiers, the Brogans, and the railway company, all defendants in the above cause, joined in bringing the cattle from Texas and in driving them from the station of Hartford, on the line of the Missouri, Kansas and Texas Railway Company, to the Brogan pasture, and in keeping and main-
11 taining them in the Brogan pasture during the summer of 1892, and that these parties were jointly interested in the proceeds of the sale of these cattle and in the distribution of the fund arising from such sale; that other defendants named in the title of the above and foregoing amended petition were residents of Chase county, Kansas; that the appointment of T. J. Acheson receiver was made before the filing of the amended petition and prior to making the Missouri, Kansas and Texas Railway Company a part- defendant, and no notice whatever was ever served upon it of an application for a receiver in the above cause. And thereupon Farrington and Lantry, named as defendants in the above cause, filed their answer and cross-petition as defendants therein, of which said answer and cross-petition the following is an exact copy:

(Title omitted.)

Come now the defendants herein, Charles J. Lantry and J. C. Farrington, partners as Farrington and Lantry, and for their answer and cross-petition to the amended petition of the plaintiff herein and for a cause of action against the defendants hereinafter named allege and say the following facts:

That C. J. Lantry and J. C. Farrington are and were long prior to the commencement of this suit partners, doing business in Chase county, Kansas, under the firm name and style of "Farrington and Lantry;" that the said defendants, E. A. Hosier and George B. Hosier, are and for more than two years last past have been partners, doing business under the firm name and style of Hosier Brothers.

That the Missouri, Kansas and Texas R. R. Co. is and for more than three years last past has been a corporation duly organized under and by virtue of the laws of the State of Kansas, and for two years last past has owned and operated a railroad from Ft. Worth, Texas, to the city of Hartford, Lyon county, Kansas, and has kept and keeps an office at said Hartford, Kansas.

That the said Francis Brogan, W. J. Brogan, and Joseph M. Brogan are and have been for two years last past partners as above alleged; that D. C. Jones and W. L. Jones, parties mentioned in the plaintiff's petition as defendants, are and for more than one

year last past have been partners under the firm name and style of "D. L. Jones and Brother's Live Stock Commission Co.;" that ever since April 1st, 1892, these defendants, Farrington and Lantry, have resided in Chase county, Kansas, and owned and kept six hundred and eighty-nine (689) head of native, acclimated, domestic cattle, of the actual value of $43,000.00; that the defendants owned and kept in the State of Kansas 2,300 head of wild, undomesticated Texas cattle at a point south of the 27th parallel of north latitude and all of said cattle were afflicted with Texas splenic or Spanish fever, and liable and capable of communicating said disease to any of the native cattle of Kansas.

That between April 1st and July 15th, 1892, the said defendants, Hosier Brothers, The Missouri, Kansas and Texas R. R. Co., Francis Brogan, W. J. Brogan, and Joseph N. Brogan, kept, shipped, transported, drove, and b-ought the said 2,300 head of Texas cattle from a point in Texas south of the 37 parallel of north latitude into the State of Kansas, in violation of an act of the legislature of the State of Kansas entitled "An act for the protection of cattle against contagious diseases and known as chapter 161 of the Laws of 1881 and acts amendatory thereof, supplemental and additional thereto; that, in violation of said act, the said defendants last named did, within the time last aforesaid, keep, ship, transport, and drive the aforesaid Texas cattle into the State of Kansas from the aforesaid point to Hartford Kansas, and from Hartford, Kansas, aforesaid through the county of Lyon into
12 the adjoining county of Chase, in said State of Kansas, and kept, drove, and caused to be kept and driven the said Texas cattle upon the same highway, range, and pasture with said cattle of these defendants; that the said Texas cattle had the disease known as the Texas splenic or Spanish fever and were liable and capable of communicating the Texas splenic or Spanish fever to the domestic cattle of the State, and — the aforesaid cattle were as aforesaid shipped, transported, driven, and kept *by* the said defendants, Hosier Brothers, Missouri, Kansas and Texas R. R. Co., Francis Brogan, W. J. Brogan, and Joseph Brogan, had knowledge and were *apt by* reasonable inquiry and had reason and cause to know that the said Texas cattle so kept, shipped, transported, and driven were of the kind capable of communicating and liable to communicate and impart the said disease to the domestic cattle of this State and to the aforesaid cattle of these defendants, and said Texas cattle so kept, shipped, transported, and driven did give, communicate, and impart the said disease to all the aforesaid cattle of these *plaintiffs*, so that *the* they became and were afflicted with said disease, so that 206 head of four and five year old steers, at the value of $50.00 per head, sickened and died of said Texas splenic or Spanish fever, and 662 head of the said cattle became afflicted and sick of said disease and reduced and depreciated in value on account of being afflicted with Texas splenic or Spanish fever, in the sum of $15.00 per head, and these defendants were compelled and did pay out a large sum of money and spent much time in caring for, feeding, treating, and trying to heal and cure the said

cattle, in the sum of $2,500.00, and in burying them to protect himself and the health of the community, in the sum of $1,000.00, to the total damage of these defendants in the sum of $30,130.00; that said Texas cattle that communicated said disease were as aforesaid driven by the said defendants, Hosier Brothers, The Missouri, Kansas and Texas R. R. Co., and the said Brogans, from Hartford, in said Lyon county, Kansas, to a large ranch owned and occupied by the said Brogans in the southeast corner of the said Chase county, Kansas, where cattle were kept by the said defendants last named, and were held in quarantine by the sheriff of the said county, and were so holding them according to law at the commencement of this suit; and thereafter, by agreement of all the parties and upon proper showing, the court duly appointed T. J. Atchison as receiver in said suit and who took possession of said cattle from the sheriff so holding them in quarantine, and thereafter, by consent of all the parties in interest and upon order of said court duly made, the said receiver sold the said cattle and now has in his possession all the money and proceeds received from said stock, namely, the said Texas cattle so driven in by the said defendants; that on the 21st day of July, 1892, these defendants, Farrington and Lantry, as plaintiffs, commenced a suit in this court against the defendants herein, W. J. Brogan, Francis Brogan, Joseph Brogan, and Hosier Brothers, and at the time of the commencement of said suit had an attachment in said cause, which was levied upon the said 2,300 head of cattle owned by said Hosier Brothers as aforesaid; that the said attachment so levied in said suit brought by these defendants, as plaintiffs, was the first and prior attachment levied upon said stock; that by the levy of said attachment — prior in point of time to any attachment made by the plaintiff in this case or any of the defendants herein who suffered loss by said cattle being driven in; that by reason of said facts these defendants, by reason of their prior attachment, have a first lien and claim on the money and proceeds in the hands of the receiver appointed
13 in this action by the court, and that the said plaintiff and each and all of the defendants herein have or claim a lien upon the said fund in the hands of the said receiver herein, the exact nature of which these defendants are unable to state, but allege the fact to be that each and all of the claims of the plaintiff and the defendants herein are subordinate and inferior to the lien of the plaintiffs herein on said fund, because of the loss of cattle sustained by them and because of the said disease being communicated to their cattle by the said Texas cattle above mentioned and because of their prior attachment levied upon the same heretofore stated.

Wherefore these defendants demand judgment against the said defendants, Hosier Brothers, The Missouri, Kansas and Texas R. R. Co., Francis Brogan, W. J. Brogan, and Joseph N. Brogan, in the said sum of thirty thousand one hundred and thirty ($30,130.00) dollars, together with costs of this suit; that the same may be adjudged and decreed to be a first lien upon the aforesaid fund prior and superior to any claim made by either of the parties hereto, and

that these defendants have such further and other relief as may be just, equitable, and proper.

MADDEN BROS,
Attorneys for Farrington and Lantry.

And thereupon H. R. Scroggins filed his answer and cross-petition in words and figures as follows, to wit:

STATE OF KANSAS, }
Chase County. }

In the District Court of said County.

CHAS. HABER, Plaintiff,
vs.
E. A. HOSIER and GEORGE B. HOSIER, Partners as Hosier Bros.; Missouri, Kansas and Texas R. R. Co., and Francis Brogan and W. J. Brogan and Joseph N. Brogan, Partners as Francis Brogan and Francis Brogan and Sons; Thomas E. Tutt, D. L. Jones, and L. S. Jones, Partners as the D. L. Jones Live Stock Commission Company; H. R. Scroggins *et al.*, Defendants.

Answer and Cross-petition of H. R. Scroggins.

Comes now the said H. R. Scroggins, one of the defendants in the above-entitled action, and shows to the court that he is interested in said action in the manner following: He refers to all the allegations of the plaintiff's amended petition filed herein, and avers that they are true, and makes them by this reference a part of his cross-petition; and further shows that he is a resident of Lyon county, and that the Texas cattle mentioned in plaintiff's petition were so transported, driven, and kept as to expose to the contagion and disease known as Texas splenic or Spanish fever 56 head of native and domestic cattle, the same consisting of 51 head of steers, 2 head of cows, and 3 head of calves, and belonging to this answering defendant.

And from such exposure all of said cattle of this answering defendant became infected by and with such disease, and that thereby 51 head of the same died, they being of the value of $3,000.00, and 5 head thereof became diseased and depreciated in value to the amount of $50.00; that he was put to great expense in doctoring and caring for such diseased cattle and in burying them that died to his total expense of $200.00; that he has a statutory lien
14 upon the funds in the hands of the said receiver to the said amount of $3,550, his damage aforesaid, prior and superior to any claim under any mortgage or trust deeds.

Wherefore he prays that he may have personal judgment against the said defendants, Hosier Bros., Missouri, Kansas and Texas R. R., and the said Brogans, for the full amount of his said damages, and that the same may be declared and decreed to be first and prior lien upon the money in the hands of the said receiver.

J. JAY BUCK,
Attorney for said H. R. Scroggins.

And thereupon the following defendants filed answer and cross-petitions exactly like the one last above set out *of*, claiming amounts as follows, to wit:

George Atkinson	$40 00
S. C. Bixler	18 00
Hermann Bohn	36 00
Joseph Pratt	64 00
Adam Bitler	224 00
Adolph Brier	20 00
John Brier	60 00
Hermann Brier	123 00
Hannah Bowers	151 00
John D. Bolton	28 00
H. A. Boltz	35 00
G. E. Bodine	12 00
D. S. Baysinger	22 00
V. G. Baysinger	36 00
Winnie Baysinger	21 00
John Bricker	15 00
G. C. Bender	40 00
C. N. Buck	85 00
L. Y. Cooper	373 50
G. S. Collins	23 00
J. C. Cooley	16 00
Mary Conway	84 00
Carson and Osborn	707 50
M. J. Collard	143 00
Wm. Dunlop	217 00
Phillip Davis	60 00
Elizabeth Davis	65 00
Lawrence Dresher	106 00
J. D. Dunn	22 50
R. M. Elliott	128 00
George Elliott	40 00
E. W. Everett	25 00
John H. Ferran	35 00
John C. Furnas	50 00
Furnas and Martindale	196 00
E. Fullen	25 00
Deitrich Fox	117 00
R. Funk	81 00
Farrington & Lantry	19,325 08
D. H. J. Fuller	70 00
D. H. Gard	67 00
Henry Geiger	322 00
Mrs. L. B. Hull	25 00
15 Louis Heitzman	60 00
Theodore Hurtig	20 00
G. O. Hughes	85 00
J. D. Hughes	90 00

Isaac Hawbecker	$181 00
John Hicks	25 00
H. H. Henry	106 33
Owen Hughes	60 00
John Hock	391 00
Mrs. V. J. Hall	18 00
Anna Hughes	135 00
J. H. Hock	55 00
John W. Hughes	148 00
W. H. Hickox	15 00
W. T. Hite	80 00
James Hutton	20 00
A. T. Johnson	20 00
Amanda J. Jones	82 00
Edward Jenkins	113 00
Jane Jones	518 00
H. C. Jackson	3,099 25
S. F. Jones	507 50
Michael Janker	243 00
G. P. Jones	247 00
W. B. Johns	43 00
Joseph Kuhlman	227 00
Christ Kruger	617 00
A. Kinne	68 00
J. W. Ketcham	808 00
Lyons & Campbell Ranch Cattle Co	3,514 14
John Langley	118 00
D. J. Lewis	90 00
Leitler Bros	280 00
G. W. Lewis	300 00
J. W. Montgomery	3,055 40
John Maddox	30 00
Alfred Marley	40 00
Marshall Meal	20 00
Mat. Maurin	99 00
Henry Meeker	15 00
A. Murphy	29 00
Timothy Murphy	20 00
John Middaugh	20 00
Mary McClelland	20 00
P. McCormick	20 00
David McKee	32 00
Charles McKee	20 00
L. L. McKee	20 00
F. M. Nine	88 00
J. W. Nurenberger	22 50
William Nicholas	30 00
Robert North	60 00
Olson Brothers	806 00
L. W. Ostrum	85 00
M. A. Pease	75 00

George Parker	$20 00
John Patch	770 00
John P. Perrier	130 00
W. C. Phillips	20 00
16 J. G. Rumford	60 00
Wesley Roberts	44 00
S. P. Reeser	20 00
T. M. Robinson	22 00
J. P. Rossillin	70 00
Mrs. Martha Smith	40 00
Eureka Springs Cattle Company	150 00
John Scroeder	170 00
D. S. Star	206 00
Harry Soul	25 00
Guy Slead	20 00
D. B. Stigner	25 00
J. A. Stotler	154 00
F. G. Soule	115 00
Peter Schleisher	229 00
John Strutzel	95 00
Matthew Swager	85 00
Harry Stuttle	49 00
Widow Smith	40 00
C. W. Stotler	52 00
John Stotler	104 00
Alice Sternberger	95 00
J. L. Stratton	90 00
John Sclisher	17 00
A. G. Shepard	25 00
J. F. Stratton	275 00
H. A. Taylor	12 00
J. A. Thompson	20 00
George Terrell	205 00
J. W. and J. C. Van Cleve	336 00
Mary Westfall	79 00
George Ward	189 00
W. H. Watkins	80 00
T. E. Welch	175 00
Joseph Wagner	150 00
G. E. Welch	70 00
E. T. White	256 00
Wright Brothers	87 00
H. R. Williams	20 00
A. A. Wilson	20 00
W. H. Zinck	12 00
P. C. Zinck	30 00

And thereupon the defendant filed the following motion to make said petitions more definite and certain, which, by agreement made in open court, was to be considered as made to all of the cross-peti-

tions above set out; which agreement was in writing and is as follows:

17 STATE OF KANSAS, }
County of Chase. }

In the District Court of said County.

CHARLES HABER, Plaintiff,
vs.
E. A. HOSIER and GEORGE HOSIER, Partners as Hosier Bros.; Francis Brogan, W. J. Brogan, Joseph N. Brogan and The Missouri, Kansas and Texas Railway Company, and Others, Defendants.

Journal Entry.

Now, to wit, on this 28th day of August, at the May, 1893, term of this court, the cause came on for hearing upon the motion filed by said defendant, The Missouri, Kansas and Texas Railway Company, to the petition of the said plaintiff and to each and all the answers and cross-petitions of all the defendants in said cause, save and except the M., K. and T. R'y Co., Thomas E. Tutt, and the D. L. Jones and Bro. Live Stock Commission Company—

The said plaintiff appearing by J. Jay Buck and E. W. Cunningham, his attorneys; Hosier Bros. by Lambert and Dickinson, their attorneys; Thomas E. Tutt and the D. L. Jones and Bros. Live Stock Commission Company by C. B. Graves, their attorney; E. T. White by L. B. Kellogg, his attorney; Farrington and Lantry and Montgomery and Jones by Madden Bros., their attorney-, and all the other defendants by Buck and Cunningham, their attorneys, and it was stipulated and agreed by all the attorneys in open court that said defendants who had not answered could file in any informal manner through Buck and Cunningham their cross-petitions like that of H. R. Scroggins, and that the motion so filed by the said railway company should be considered as filed to such cross-petitions, and such motion, being duly argued by counsel and considered by the court, was by the court overruled; to which ruling and decision of the court, the said defendant railway company duly excepted. Said railway company was then given until September 20th, 1893, in which to file its answer herein, and that any of the parties may plead in one reply to all answers and cross-petitions on or before October 9th, 1893.

T. N. Sedgwick, attorney for M., K. and T. R'y Co.
Lambert and Dickson, attorney- for Hosier Bros.
O. K. Buck and Cunningham.

Motion Last Above Referred to.

Comes now the defendant The Missouri, Kansas and Texas Railway Company and moves the court to compel the plaintiff to make his petition more definite and certain in this, to wit:

1. By stating specifically what interest, if any, in or connection

with said cattle mentioned in the petition the defendant The Missouri, Kansas and Texas Railway Company had at the time of the shipment or at any other time other than that of a common carrier.

2. By stating specifically what, if any, interest in or lien or claim upon the funds in the hands of T. J. Atchison the defendant The Missouri, Kansas and Texas Railway Company has or claims to have, for the reason that said facts do not appear to be definitely stated in said petition, and it is necessary to enable the defendant The Missouri, Kansas and Texas Railway Company to know just what issue it has to meet in this case that said facts be definitely stated.

T. N. SEDGWICK,
Attorney for Defendant Missouri, Kansas & Texas R'y Company.

18 And thereafter and before said motion was heard by the court the defendants Francis Brogan and Joseph N. Brogan filed their answer, wherein they claimed affirmative relief against Hosier Brothers and the said Missouri, Kansas & Texas Railway Company in the sum of six thousand (6,000) dollars for damages to the pasture by the introduction of cattle infected with Texas fever.

And the defendant Thomas E. Tutt filed his answer, wherein he claimed judgment against Hosier Brothers for $147,980.00 and a first lien upon the proceeds of the sale of the infected cattle in the hands of T. J. Atcheson, assignee, by reason of a certain chattel mortgage which had been given him prior to the shipment of the cattle to secure said sum of money, which said mortgage was given upon the ranch in Pecos county, Texas, and all of the cattle thereon.

And the defendants Jones Brothers also filed an answer, wherein they claimed judgment against Hosier Brothers for $5,192.90, but no relief whatever against the Missouri, Kansas — Texas Railway Company, and also claimed a first lien upon the funds or proceeds of the sale of the cattle by reason of a chattel mortgage given by Hosier Brothers upon these specific cattle to secure said sum.

And thereafter, on the 28th day of August, 1893, the above cause came on for hearing upon the above motion filed by the defendant The Missouri, Kansas and Texas Railway Company to make said petition and cross-petitions more definite and certain; and, after argument of counsel for both sides and due consideration by the court, the said motion was by the court overruled; to which ruling of the court in overruling said motion the defendant The Missouri, Kansas and Texas Railway Company at the time duly excepted and excepts.

And thereafter, to wit, on Dec. 11th, 1893, the Missouri, Kansas and Texas Railway Company filed its amended answer in said cause in Lyon county district court, of which said answer the following is an exact copy, to wit:

(Title omitted.)

Amended Answer of Defendant M., K. & T. R'y Company.

1. Comes now The Missouri, Kansas and Texas Railway Company, one of the defendants in the above-entitled cause, and, for its first defense and amended answer to the petition of the plaintiff and also to the cross-petitions of Hosier Brothers, Francis Brogan, W. J. Brogan, Joseph N. Brogan, Farrington and Lantry, and all others who have filed cross-petitions demanding affirmative relief against this defendant, denies each and every allegation in said petition contained and in each of said cross-petitions and answers contained, except such allegations and statements as shall be hereinafter in some one of the other defenses herein to be expressly admitted, modified, or differently stated.

2. And for a second defense and further answer to the petition of the plaintiff and to each and all of said cross-petitions and answers demanding affirmative relief against the Missouri, Kansas and Texas Railway Company this defendant alleges and shows to the court that it is a corporation duly organized and incorporated under and by virtue of the laws of the State of Kansas; that it is the owner of and was during the year 1892 and during said time was operating a line of railway extending from Denison, Texas, to Hannibal, Missouri, and running through the entire States of Kansas and Missouri and through the Indian Territory, with a branch deflected from Parsons, Kansas, running thence to Junction City, Kansas, making about 1,200 miles of railway; that at said time, to wit, during the year 1892, it was engaged as a common carrier of freight and passengers, and as such common carrier conducted an interstate transportation business.

That by the terms of its charter it is a railway company
19 to do business as a common carrier of freight and passengers and has no power or authority to engage in any other business; that the Missouri, Kansas and Texas Railway Company of Texas is a corporation duly organized and incorporated under and by virtue of the laws of the State of Texas, with a line of road extending from Denison, Texas, to Taylor, Texas, and is a common carrier of both freight and passengers within the State of Texas, and is an independent line of road under a separate and distinct management, having no relation with this defendant as to the organization and control and operation of the properties.

This defendant further alleges and shows to the court that the Texas and Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States, and as such has a line of railroad extending from Marshall, Texas, to El Paso, Texas, crossing and intersecting the said Missouri, Kansas and Texas Railway of Texas at Fort Worth, Texas, and is a common carrier of both freight and passengers within said State.

That the town or station of Midland, Texas, is situated on the Texas and Pacific railway and is 307 miles west of the station of Fort Worth, Texas, and the same distance west of the line of the

Missouri, Kansas and Texas Railway Company of Texas; that this defendant connects with the Missouri, Kansas and Texas Railway of Texas at Denison, Texas.

This defendant further alleges and shows to the court that on April 28th, 1892, the defendants Hosier Brothers entered into a written contract with the said Texas and Pacific Railway Company to transport for them 744 head of cattle from Midland, Texas, to Hartford, Kansas, and on April 29th, 1892, made a further and additional contract in writing to transport from Midland, Texas, to Hartford, Kansas, 644 head of cattle; that on June 10th, 1892, the said Hosier Bros. made a further contract in writing to transport from Midland, Texas, to Hartford, Kansas, four hundred and eighty-five head of cattle; that copies of said contracts are hereto attached, marked "Exhibits A, B, C, D, and L" respectively, and made a part of this answer.

That said defendants, Hosier Brothers, loaded said cattle into cars furnished to them at Midland, Texas, by the said Texas and Pacific Railway Company, and said cattle were shipped to Hartford, Kansas, in the same identical cars into which they were loaded at Midland, Texas; that the said station of Hartford, Kansas, to which said cattle were to be shipped by the terms of the said contracts so made by the said Hosier Brothers with the said Texas and Pacific Railway Company, is situated on the line of the Missouri, Kansas and Texas Railway Company in Lyon county, Kansas, as the said line of railway runs through said county; that there is no other railway running into or near the said town of Hartford, Kansas, except the said Missouri, Kansas and Texas railway, the said station named as the destination of said cattle; that because of said fact, in order to have said cattle reach the destination named in said live-stock contracts, to which reference is herein made, it was necessary that they be carried a portion of the distance over the line of the Missouri, Kansas and Texas Railway Company, and the most direct as well as the quickest route for the shipment of said cattle to said destination was to deliver them to the said Missouri, Kansas and Texas Railway Company of Texas at Fort Worth, Texas, where the said Texas and Pacific Railway Company with its line of road crosses and intersects the line of road operated by the Missouri, Kansas and Texas Railway Company of Texas; that the said Missouri, Kansas & Texas R'l'y Co., defendant herein, made no contract whatever with the said Hosier Brothers for the shipment of said cattle.

20 That it received the said cattle from the said Missouri, Kansas and Texas Railway Company of Texas at Denison, Texas, as a connecting carrier and discharged its full duty by transporting the same as quickly as possible and delivered the same to the said Hosier Brothers at the station of Hartford, the destination of said cattle named is said contracts; that upon the delivery of said cattle to Hosier Brothers at the said station of Hartford it discharged its full duty and had no further connection with or interest in said cattle.

3. And for a further answer and third defense to the petition of

the plaintiff and to each and all of the cross-petitions and answers filed by defendants herein wherein relief is demanded against this defendant, this defendant alleges and shows to the court *and* that it refers to all of the second defense hereinabove set forth any by such reference makes the said second defense a part and parcel of this third defense as fully and completely as though the same was set out herein at length.

This defendant further alleges and shows to the court that it has no line of railway running into or through Chase county, Kansas, nor has it an agent of any kind of description within the limits of said county, and further alleges and shows to the court that the only service made upon it in this case was made by the sheriff of Lyon county, Kansas, upon its agent at the station of Emporia, in said county, and that no service whatever has been made upon this defendant within the said Chase county, Kansas.

This defendant further alleges and shows to the court that it had nothing whatever to do with the driving of the cattle from Hartford to the Brogan pastures, in Chase county, Kansas, nor did it have any connection whatever with the person or persons who drove said cattle across the country from the station of Hartford to the Brogan pasture, in said Chase county, Kansas, and that because of this fact the said defendant has been wrongfully sued in this court and this court has no jurisdiction whatever over either the subject-matter as against this defendant or over this defendant.

4. For a fourth defense and further answer to the petition of the plaintiff, also to the answers and cross-petitions of the defendants who have filed answers and cross-petitions claiming relief against this defendant, this defendant alleges and shows to the court that on Feb'y 26th, 1892, the Honorable Jeremiah M. Rusk, as Secretary of the Department of Agriculture, issued and served upon all the railroad companies of the United States, including the Missouri, Kansas and Texas Railway Company, his regulations concerning cattle transportation; a copy of said regulations so issued by him is hereto attached and marked "Exhibit E;" that said circular letter establishing regulations concerning the transportation of cattle was issued in accordance with section 7 of the act of Congress of May 9th, 1884, entitled "An act for the establishment of a bureau of animal industry to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals," and of the act of Congress approved April 4th, 1891, making appropriations for the Department of Agriculture for the fiscal year ending June 30th, 1892, which said rules and regulations removed all restrictions from the *the* transportation of cattle to and from any portion of the United States except that portion described in said regulations as the area within which the disease known as splenic or Southern fever exists among cattle.

21 This defendant further alleges and shows to the court that Midland, Texas, the point from where said cattle were shipped, lies wholly outside of the infected district, as described in the regulations of the Secretary of the Department of Agriculture, and said

cattle had been kept in Pecos county, Texas, since the 1st day of December, 1891, and had not been east or south of the Government quarantine line, as established February 26th, 1892, by the Department of Agriculture, since said December 1st, 1891, as more fully appears from the affidavit of N. T. Wilson, T. Ramsey, and George B. Hosier, dated April 20th, 1892, a copy of which is hereto attached and marked Exhibit G and made a part hereof for reference, and also from the affidavit of J. F. Camp and D. G. Frank and George B. Hosier, dated June 1st, 1892, a copy of which is hereto attached, marked Exhibit H, and made a part hereof for reference.

The defendant further alleges and shows to the court that before it would receive said cattle for shipment it compelled Hosier Brothers, the owners of said cattle, to procure from Albert Dean, live-stock inspector of the Bureau of Animal Industry, acting under authority of the Department of Agriculture of the United States, permission to ship said cattle into the State of Kansas, and also to procure permission from the State board of live-stock sanitary commissioners of the State of Kansas to ship said cattle into the said State of Kansas; that said permission from the State board of live-stock sanitary commissioners was in writing, and the said Albert Dean, under and by virtue of his position and appointment of inspector of the Bureau of Animal Industry and under and by virtue of an appointment from the State board of live-stock commissioners of the State of Kansas, had authority to issue such permits. On the 24th day of April, 1892, the said Albert Dean, as such live-stock inspector, by virtue of the authority aforesaid, duly issued to said Hosier Brothers permission to bring 1,501 head of cattle into the State of Kansas over the lines of the Missouri, Kansas and Texas Railway Company, a copy of which said permit is hereto attached, marked Exhibit I, and made a part hereof for reference; that thereafter and on June 3rd, 1892, by special direction of the board of live-stock sanitary commissioners of the State of Kansas the said Albert Dean, as such live-stock inspector, issued a further permit to said Hosier Brothers to bring into the State of Kansas over the line of the Missouri, Kansas and Texas Railway Company 500 head of cattle, a copy of which said permit, marked Exhibit J, is hereto attached and made a part hereof for reference.

This defendant further alleges and shows to the court that it never was at any time advised or notified from any source whatsoever that said cattle were infected with Texas or Spanish fever or that they were cattle that would be likely to spread the fever or disease known as Texas or Spanish fever; that by virtue of its relations to the public as a common carrier it was bound to receive and transport said cattle.

5. This defendant, for a further answer and fifth defense to the petition of the plaintiff, and also to the cross-petition of each and all of the defendants herein claiming affirmative relief of this defendant, alleges and shows to the court that since the commencement of this action the said Hosier Brothers, the owners of said cattle, have made a settlement of the cause of action set up in the answer of the

codefendants of this defendant, who are claiming affirmative relief against this defendant, which is or to be a full and complete
22 satisfaction as to said Hosier Brothers and as to said Brogans, and that by virtue of said settlement the said Hosier Brothers and Brogans have been or are to be released from all further claims for damages by reason of the ground of complaint set forth in the petition of the plaintiff and in the answers and cross-petitions of the defendants claiming affirmative relief against this defendant. This defendant alleges the fact to be that the matters in controversy settled or agreed to be settled by the plaintiff with the said Hosier Brothers and by said defendants claiming affirmative relief against this defendant with the said Hosier Brothers is the same identical cause of action described in the plaintiff's petition and in the answers and cross-petitions of the defendants herein claiming affirmative relief against this defendant, and wherein it is claimed that this defendant and the said Hosier Brothers and the said Brogans are jointly liable, and that because of said settlement or agreements to settle, so made by the plaintiff and all of the defendants herein claiming affirmative relief against this defendant, with the said Hosier Brothers, this defendant is entitled to the benefit thereof and is therefore entitled to be discharged from all further liability thereon for the reason that the same is a full and complete settlement of said claim against this defendant as well as against the said Hosier Brothers and the said Brogans.

Wherefore this defendant prays that this action be dismissed and that it recover its costs.

T. N. SEDGWICK,
Attorney for Defendant M., K. & T. R'y Co.

STATE OF KANSAS, }
County of Labette. }

T. N. Sedgwick, of lawful age, being first duly sworn, deposes and says—

That he is the attorney for the defendant, The Missouri, Kansas and Texas Railway Company, in the above-entitled cause; that he has read the above and foregoing amended answer, and that the facts therein stated are true.

Further affiant saith not.

T. N. SEDGWICK.

Sworn to and subscribed before me this 11th day of December 1893.

M. Q. STARR,
[SEAL.] *Clerk District Court.*

My commission expires on the — day of ——, 189–.

Filed Dec. 11th, 1893.

M. Q. STARR, *Clerk.*

EXHIBIT "G."

Affidavit.

STATE OF TEXAS, }
County of Bexar. }

Personally appeared before me, a notary public in and for the county and State aforesaid, J. F. Camp and D. G. Franks, of lawful age, who, being duly sworn, on their oath say that they are citizens of the county of Pecos and State of Texas, and that of their personal knowledge that they know 500 head of steers and cows and cattle marked and branded—

t5,-T5-TP-HExR-55Px,-50-4P10

now owned by Hosier Brothers, of the county of Jackson, State of Missouri, and that the above-described cattle have been held in pasture owned and leased by Hosier Brothers in the county of Pecos and State of Texas since the first day of December, 1891, and that said cattle are now healthy and have not come in contact with or been exposed in any manner to any cattle that have come east or south of the quarantine line established February 26th, 1892, by the United States Department of Agriculture since the 1st day
23 of February, 1892, and that no contagious or infectious disease to which cattle are subject is known to exist in said pasture or vicinity, and that they are not interested in said cattle as owners or otherwise.

J. F. CAMP.
D. G. FRANKS.

Subscribed and sworn to before me this 1st day of June, 1892.
W. H. COLLINS,
Notary Public, Bexar Co., Texas.

And also personally appeared George B. Hosier, and on his oath says he has read the foregoing affidavit and is acquainted with the parties therein named and the cattle described by the same, and knows the contents thereof to be true, as stated.

GEO. B. HOSIER,
Owner and Manager.

Subscribed and sworn to before me this 1st day of June, 1892.
W. G. COLLINS,
Notary Public, Bexar County, Texas.

And *I* this day make application for a permit to ship said cattle to Hartford, Kansas, via the T. and P. and M., K. and T. railroads.
HOSIER BROTHERS, *Owners.*

Consigned to Hosier Brothers.

A true copy.
ALBERT DEAN.

EXHIBIT "H."

Affidavit.

STATE OF TEXAS, }
County of Pecos. }

Personally appeared before me, a notary public in and for the county and State aforesaid, N. T. Wilson and T. Ramsey, of lawful age, who, being duly sworn, on their oath say that they are citizens of the county of Pecos and State of Texas, and that of their personal knowledge they know 1,501 head of cattle marked and branded

+15–T5–TP–$\overset{H}{\text{HT}}$–50–T5–TxR4–HE–MR.–Px–A. P.x.–AP–BOB.

now owned by Hosier Brothers, of the county of Jackson, State of Missouri, and that the above-described cattle have been held in the pasture, open range, owned and leased by Hosier Brothers, in the county of Pecos and State of Texas, since the 1st day of December, 1891, and that said cattle are now healthy and have not come in contact with or been exposed in any manner to any cattle that have come from east or south of the quarantine line established February 26th, 1892, by the United States Department of Agriculture since the 1st day of February, 1892, and that no contagious or infectious disease to which cattle are subject is known to exist in said pasture or vicinity, and that they are not interested in said cattle as owners or otherwise.

N. T. WILSON.
T. RAMSEY.

Subscribed and sworn to before me this 20th day of April, 1892.

ROY BEAN,
J. P., Pvc. No. S, Valverde County, Texas.

And also personally appeared George B. Hosier, and on his oath says he has read the foregoing affidavit and is acquainted with the parties therein named and the cattle described by the same, and knows the contents thereof to be true as stated.

GEORGE B. HOSIER,
Owner and Manager.

Subscribed and sworn to before me this 20th day of April, 1892.

ROY BEAN,
J. P., Valverde County, for No. 5, Texas.

30 10003.

EXHIBIT "E."

Regulations Concerning Cattle Transportation.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *February* 26, 1892.

To the managers and agents of railroad and transportation companies of the United States, stockmen, and others:

The regulations concerning cattle transportation issued by this department January 11, 1892, are hereby revoked, and the following prescribed in place thereof:

In accordance with section 7 of the act of Congress approved May 29, 1884, entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases of domestic animals," and of the act of Congress approved March 4, 1891, making appropriation for the Department of Agriculture for the fiscal year ending June 30, 1892, you are hereby notified that a contagious and infectious disease known as splenetic or Southern fever exists among cattle in the following-described area of the United States:

All that country lying east and south of a line commencing at the southwest corner of Valverde county, State of Texas, on the Rio Grande river; thence running northerly along the western boundaries of Valverde and Crockett counties, to the northwest corner of Crockett county; thence easterly along the northern boundaries of Crockett and Schleicher counties to the southeastern corner of Irion county; thence northerly along the eastern boundary of Irion county to the northeast corner of said county; thence northerly to
the southern boundary of Coke county; thence westerly to
31 the southwestern corner of Coke county; thence northerly along the western boundary of Coke county to the southern boundary of Mitchell county; thence easterly to the southeast corner of Mitchell county, and thence northerly along the western boundaries of Nolan and Fisher counties to the southern boundary of Kent county; thence easterly along the southern boundary of Kent county to the southwestern corner of Stonewall county; thence northerly along the western boundary of Stonewall county to the southeastern corner of Dickens county; thence easterly along the northern boundary of Stonewall county to the southwestern corner of Knox county; thence northerly along the western boundaries of Knox and Hardeman counties to the Red river; thence northwesterly following the Red river to its point of intersection with the one hundredth meridian of longitude; thence northerly from said point of intersection along said one hundredth meridian to the southern boundary of the State of Kansas; thence easterly along the southern boundary of the State of Kansas to the north-

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east corner of the Indian Territory; thence southerly along the eastern boundary of the Indian Territory to the southwest corner of the State of Missouri; thence easterly along the southern boundary of the State of Missouri to the Mississippi river; thence running southerly along the Mississippi river to the southwestern corner of the county of Lauderdale, State of Tennessee; thence running easterly, following the southern boundaries of the counties of Lauderdale, Crockett, Gibson, Carroll, Benton, Perry, Lewis, Maurey, Marshall, Bedford, Coffee, Grundy, Sequatchie, Hamilton, Meigs, McMinn, and Monroe, State of Tennessee, to the eastern boundary of said State; thence following the northern boundaries of the counties of Cherokee, Macon, Jackson, Transylvania, and Henderson, State of North Carolina, to the southeast corner of the county of Buncombe, of said State; thence in a northeasterly direction, following the Blue Ridge mountains, to the southwestern corner of the county of Madison, State of Virginia; thence easterly along the southern boundaries of the counties of Madison, Culpeper, and Stafford; thence northerly along the eastern boundary of Stafford county to the Potomac river; thence following the Potomac river southerly to the Chesapeake bay; thence easterly along the southern boundary of the State of Maryland to the Atlantic ocean.

From the 1st day of March to the 1st day of December, 1892, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except by rail for immediate slaughter, and when so transported the following regulations must be observed:

1. When any cattle in course of transportation from said area are unloaded north or west of this line to be fed or watered, the
32 places where said cattle are to be so fed or watered shall be set apart and no other cattle shall be admitted thereto.

2. On unloading said cattle at their points of destination, pens shall be set apart to receive them, and no other cattle shall be admitted to said pens; and the regulations relating to the movement of Texas cattle, prescribed by the cattle sanitary officers of the State where unloaded, shall be carefully observed. The cars that have carried said stock shall be cleansed and disinfected before they are again used to transport, store, or shelter animals or merchandise.

3. All cars carrying cattle from said area shall bear placards stating that said cars contain southern cattle, and each of the waybills of said shipments shall have a note upon its face with a similar statement. Whenever any cattle have come from said area and shall be reshipped from any point at which they have been unloaded to other points of destination, the cars carrying said animals shall bear similar placards with like statements, and the waybills be so stamped. At whatever point these cattle are unloaded they shall be placed in separate pens, to which no other cattle shall be admitted.

4. The cars used to transport such animals, and the pens in which they are fed and watered, and the pens set apart for their reception at points of destination, shall be disinfected in the following manner:

(*a*) Remove all litter and manure. This litter and manure may be disinfected by mixing it with lime, or diluted sulphuric acid, or, if not disinfected, it may be stored where no cattle can come into contact with it until after December 1.

(*b*) Wash the cars and the feeding and watering troughs with water until clean.

(*c*) Saturate the walls and floors of the cars and fencing troughs and shutes of the pens with a solution made by dissolving four ounces of chloride of lime to each gallon of water. Or disinfect the cars with a jet of steam under a pressure of not less than fifty pounds to the square inch.

5. It is expressly provided that cattle may be moved from those counties in the State of Tennessee which lie south of the line hereinabove described to those counties lying north of said line in said State for grazing purposes, in accordance with the regulations of the authorities of the State of Tennessee.

6. It is further expressly provided that cattle which have been at least ninety days in the counties of Coke, the eastern portion of Tom Green, Nolan, Fisher, Stonewall, Haskell, Knox, and Hardeman, State of Texas, which lie within the above-described area, may be moved from said counties by rail into the States of Colorado,
33 Wyoming, and Montana, in accordance with the regulations made by said States for the admission of southern cattle thereto: Provided—

(1.) That cattle from said area shall go into said States only for slaughter or grazing, and shall on no account be shipped from said States into any other State or Territory of the United States before the 1st day of December, 1892.

(2.) That such cattle shall not be allowed in pens or on trails or on ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1892, and that these two classes of cattle shall not be allowed to come into contact.

(3.) That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by these regulations.

(4.) That the State authorities of the States of Colorado, Wyoming, and Montana agree to enforce these provisions.

The losses resulting yearly to the owners of susceptible cattle, both in the interstate and export trade, by the contraction of this disease from exposure in unclean and infected cars and pens, and by means of the manure carried in unclean cars from place to place, have become a matter of grave and serious concern to the cattle industry of the United States. It is absolutely essential, therefore, that this cattle industry should be protected as far as possible by separating the dangerous cattle and by the adoption of efficient methods of disinfection.

Inspectors will be instructed to see that disinfection is properly done, and it is expected that transportation companies will promptly put into operation the above methods.

Very respectfully, J. M. RUSK, *Secretary.*

34 And I this day make application for permit to ship said cattle to Hartford, Kansas, via the T. & P. and M., K. & T. railroads, consigned to Hosier Brothers.

HOSIER BROTHERS.

A true copy.

ALBERT DEAN.

35 EXHIBIT "I."

STATE OF KANSAS:

CATTLE INSPECTOR'S OFFICE,
KANSAS CITY, KANSAS, *April 24th*, 1892.

The Missouri, Kansas and Texas Railroad Company is hereby permitted to ship to Hartford, Kansas, 1,501 head of cattle, consigned to Hosier Brothers.

Said cattle are shown by affidavit in this office to have been from Pecos county, Texas. These cattle are branded **t 3** and other brands.

By order of live-stock sanitary commission.

ALBERT DEAN, *Inspector.*

EXHIBIT "J."

STATE OF KANSAS:

CAT-LE INSPECTOR'S OFFICE,
KANSAS CITY, KANSAS, *Ju-e 3rd*, 1892.

The Missouri, Kansas and Texas Railroad Company is hereby permitted to ship to Hartford, Kansas, 500 head of cattle, so consigned to Hosier Brothers.

Said cattle are shown by affidavit in this office to have been from Pecos county, Texas. These cattle are branded **t 3** and other brands.

By order of live-stock sanitary commission.

ALBERT DEAN, *Inspector.*

[Written across the face in red ink:] Special order live-stock sanitary commission. Albert Dean, inspector.

To which said answer the plaintiff and each and all of the defendants claiming affirmative relief against the defendant The Missouri, Kansas and Texas Railway Company filed their reply, *of* consisting of a general denial of all of the allegations of said answer, and thereafter the following stipulation was made and entered into by and between the attorneys for all the parties interested in said cause, to wit:

(Title omitted.)

Stipulation.

It is hereby stipulated and agreed by and between all the parties hereto that the above-entitled cause and each and every issue therein, including the receiver and the funds in his hands and the order and control and distribution of said funds, be changed and

transferred to the district court of Lyon county, Kansas, there to be disposed of and judgment therein rendered and distribution of the funds therein made with the same force and effect as though the Texas cattle mentioned in the pleadings herein had been held at the commencement of this suit in Lyon county and this suit had been originally commenced in said Lyon county, and that said proceedings in said Lyon county be had upon the original pleadings and papers filed herein, and, further, as to the issues between the plaintiff and defendants claiming to have lost cattle, on the one part, and the Missouri, Kansas and Texas Railroad Company, on the other part, stand and be for trial at the December, 1893, term of the district court of Lyon county, Kansas, at such date as the same shall be assigned for hearing by the judge of said court.

And it is further agreed that any depositions heretofore taken in said action or in the action of H. R. Scoggins *vs.* said Hosier Bros. *et al.* may be read in evidence the same as though the witnesses resided and were outside of Lyon county, Kansas, and that the only authority required by the said district court of Lyon county to proceed in and finally dispose of this case and execute the judg-
36 ment therein shall be a duplicate copy of this stipulation and a certified copy of the order of the district court of Chase county changing the venue of this cause. The cost accruing in all matters herein shall follow said suit and be taxed by the district court of Lyon county.

J. JAY BUCK,
E. W. CUNNINGHAM,
BUCK AND BRUCE,
MADDEN BROS.,
Att'ys for Pl'ff and Defendants Who Have Lost Cattle.
LAMBERT AND DICKSON,
For Hosier Brothers.
C. B. GRAVES, *Att'y for Tutt.*

I agree to this upon the understanding that it shall not prejudice my right to raise any question which I could have raised on the trial in Chase county.

T. N. SEDGWICK,
Att'y for M., K. & T. R'y.

And upon the presentation of said above-signed stipulation to the district court of Chase county it made the following order, to wit:

(Title omitted.)

Upon serving and filing the stipulation herein, and the court being fully advised in the premises, it is hereby ordered that the cause and all the issues therein and the matters of the rece-ver appointed herein and the funds in his hands and the disposition thereof be*ing*, and the same are hereby, changed, and the place of trial changed and transferred to the district court of Lyon county, Kansas, and pursuant to said stipulation it is hereby further ordered

that the original papers be also transferred to said district court of Lyon county, so that the several matters may be there disposed — with the same effect as though properly originally brought there. The clerk of this court will spread this order upon the journal of this court and furnished to the clerk of the district court of Lyon county, Kansas, a certified copy of this order.

LUCIAN EARL, *Judge.*

Thereupon and in accordance with the above stipulation and order of the Honorable Lucien Earle, judge of the district court of Chase county, Kansas, the original papers in said cause were all transferred from the office of the clerk of the district court of Chase county, Kansas, to the office of the clerk of the district court of Lyon county, Kansas, and said cause was thereupon, by the said clerk of the district court of Lyon county, Kansas, entered upon the appearance docket and placed upon the trial and bar dockets of said court for the December term, A. D. 1893; and thereafter and on the 11th day of December, A. D. 1893, at the regular 1893 term of the district court, sitting in and for Lyon county, Kansas, said cause came on for trial upon the issues as joined by the pleadings herein set out, except as to the issues between the defendants Hosier Brothers and The Missouri, Kansas and Texas Railway Company and between the defendants Brogans and The Missouri, Kansas and Texas Railway Company, which were by consent of parties continued by the court; and thereupon the following proceedings were at the time had in the district court of Lyon county, Kansas, as shown by the notes of the official stenographer of said court, as follows, to wit:

37 Defendant railroad company moved to dismiss the action of the plaintiff as to the defendant railroad company, for the reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against the railroad company. The motion was overruled by the court; to which defendant railroad company excepted.

Defendant railroad company moved to dismiss all the cross-petitions of the codefendants in this case claiming affirmative relief against the M., K. and T. Railroad Company, for the reasons that there was a misjoinder and excess of parties defendant claiming affirmative relief against the railroad company. The motion was overruled; to which defendant railroad company excepted.

Defendant railroad company challenged for cause the jurors McMillan and Carey. The challenges were overruled; to which defendant railroad company excepted.

FRANCIS BROGAN was examined by Judge Cunningham and testified as follows:

Defendant railroad company objected to the introduction of any testimony upon the ground that the petition did not state facts sufficient to constitute any cause of action whatever in favor of the plaintiff and against the defendant railroad company, and upon the further ground of the misjoinder of parties defendant claiming affirm-

ative relief against the defendant railroad company, and for the further reason that upon the face of the pleadings the defendant company was entitled to judgment thereon. The objection was overruled; to which defendant railroad company excepted.

Q. Are you one of the defendants in this case—the Francis Brogan mentioned in plaintiff's petition?

A. Yes, sir.

Q. State if you had control of or owned a large pasture in Chase county in the spring of '92.

A. Yes, sir.

Q. How large?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant company excepted.

Q. You may state how large a range.

A. About fourteen thousand acres in the pastures that I used that year.

Q. What were you using those pastures for during that year?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant company excepted.

A. For grazing cattle that season.

Q. Did you make any arrangement with anybody for the purpose of pasturing cattle there?

A. Yes, sir.

Q. With whom?

A. With Mr. Hozier.

Q. E. A. Hozier?

A. Yes; of the firm of Hozier Brothers.

Q. What kind of cattle?

A. They would be range cattle from Texas shipped up here.

Q. Did he tell you what county in Texas they were to come from?

A. Pecos county.

Q. What arrangements were there made with the M., K. and T. Railroad Company, it any, with reference to shipping those cattle from Texas?

Defendant railroad company objected to the question as incompetent, irrelevant, immaterial, and not the best evidence.
38 The objection was overruled; to which defendant railroad company excepted.

Q. State any facts within your knowledge relative to the making of any such contract.

Defendant railroad company objected to the question
petent, irrelevant, immaterial, and not the best evidence. The objection was overruled; to which defendant railroad company excepted.

A. After I made this contract with Hozier Brothers—when I made this contract with Hozier Brothers there was no written contract; it was a verbal agreement of so much per head for grazing these cattle. He was on his way to Emporia. We had driven to the ranch at the time and looked it over and he was satisfied with the prospect of grazing his cattle there. We talked of terms, and finally, before he left, before going on the train, he agreed to my proposal, or rather partly agreed to it, and wired me afterward that he accepted my proposal to graze 1,500 head of cattle or as many more as he could ship; probably 1,500 more, I think. He spoke of that number, I think. I then drew up the contract and signed it and sent it to him, according to the proposal that I had made him and that he had accepted at Kansas City. So he returned the signed contract; and then the subject of shipping the cattle. In the first place, as to where I was to receive the cattle. The conditions were that I was——

Defendant company objected to the witness stating anything that was in the written contract.

By the COURT: The contract is the best evidence.

EXHIBIT "I."

(Copy.)

This agreement made this 11th, day of April 1892, between Hosier Brothers of Kansas City Mo. of the first part and Francis, Brogan of Hartford, Kansas, of the second part.

Witnesseth:—That the first parties agree to furnish to the second party at Hartford, Olpe or Bazaar Kansas, 1,500 steers to be pastured by second party during the season of 1892, on his Verdigris ranch. Second party agrees to place said cattle in his south pa ture, containing about 5,000 acres and enclosed by a three-wire fence; to keep salt constantly before them in at least five places, and to furnish men to round up and hold said cattle for cutting out shippers, and to deliver said shippers at Hartford, Olpe, or Bazaar as first parties may desire. And in case any cattle stray away, second party shall pay for them at market price; but if any cattle die it shall be first parties' loss.

And for pasturing and tending said cattle as above provided, first parties agree to pay to second parties $1.75 per steer. Payment to be made as follows: $500. May 1st. 1892 and the balance when cattle are redelivered to first parties.

This agreement made and signed in duplicate the day and year first above written.

HOSIER BROS.
FRANCIS BROGAN.

[illegible], that's in the contract. He was undecided whether——

Defendant company objected to the statement.

By Mr. SEDGWICK: I want to see the written contract.

A. I haven't the contract here.

Q. Was the contract as to the points at which you were to receive these cattle in the writing you sent to him?

A. Yes, sir.

Q. Have you the written contract with him?

A. No, sir.

Q. Where is it?

39 A. I think it is in the Emporia National bank; you can get it.

Q. This (indicating) is the contract.

A. Shall I read it?

Judge Cunningham read in evidence the contract referred to by the witness. The contract was marked Exhibit "I."

Q. Now, under this arrangement, these cattle that you speak of were furnished you?

A. Yes, sir.

Q. At what point were they delivered?

A. At Hartford.

Q. Shipped over what road?

A. The M., K. and T.

Q. By what agreement with the M., K. and T., if any, were you to receive them at Hartford?

Defendant company objected to the question as incompetent, irrelevant, and immaterial.

Q. At whose option was it where you were to receive them?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, as the contract plainly indicated where and at whose option. The objection was overruled; to which defendant company excepted.

A. Well, I will admit that I understood I was to receive the cat-le at any of those points where Mr. Hozier decided to ship them.

Q. How was it determined as to where they should be received finally?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. I received this contract from Mr. Hozier. I received a letter with it. I can't recall the words in it, but I understood that he had partly decided to ship over the Santa Fe road to Bazaar, and I had some talk with my friend Mr. Taylor, in Hartford, in regard to the matter, and I felt like helping our road in the shipment of those cattle. We call it "our road," the M., K. and T. It passes through Hartford. I told him if they were interested.

Q. Who was this Mr. Taylor?

A. Purchasing agent of the M., K. and T. railroad. He said he thought the road would be very anxious to get the shipments. I told him there was no time to lose; that the contract would be

made soon, and if they expected to get the shipments they would have to act very quickly, so we wired President Cross of the road——

Defendant company objected as immaterial, irrelevant and incompetent, and hearsay; which objection was overruled by the court; to which defendant company except-.

A. Mr. Taylor told me that Mr. Cross told him to make any arrangement he could make with me in order to get the shipment. So I said if they would make me whole on the expense of driving the cattle from Hartford across to my ranch that I would do what I could to get the shipments—that is, if I had any influence with Mr. Hozier I would use it, and I told him how I thought it could be done, and I suggested to wire Mr. Rector——

Q. Who was Mr. Rector?

A. The stock agent of the M., K. and T.; was at that time, I understood; so Mr. Taylor said that we had better wire Mr. Williams——

Q. Who was Mr. Williams?

A. The deputy stock agent, I think. At least he was the agent that had control of the business on this branch of the M., K. and T. I knew him to be such at the time. So we wired him and he came up on the next train.

40 Q. Where did he live?

A. He wired to Parsons. I don't know where he lives. He came to Hartford, I think, on the next train.

Q. Go on.

A. So I met him on the platform of the depot and told him what I thought he could do.

Q. What did you tell him?

Defendant company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant company excepted.

Q. Before the adjournment, Mr. Brogan, you were speaking about Williams coming up to Hartford. You may state to the jury what arrangement you had with reference to the taking of these cattle by the M., K. and T. from Hartford over to the Brogan ranch with Mr. Williams.

Defendant railroad company objected to the question upon the ground that it was incompetent, irrelevant, and immaterial, and for the reason that it was not shown that Williams had any authority to bind the company, and because the company could not be bound by any agreement to drive the cattle over to Bazaar, and because the written contract already in evidence disclosed that Brogan was to drive the cattle to the pasture for Hosier Bros. The objection was overruled; to which defendant railroad company excepted.

Q. Now you may state.

A. He agreed with me that if I could help to secure the shipment of these cattle for the M., K. and T. railroad that he would pay the

expense of driving these cattle to my ranch. We talked some of the amount, what it would cost, and we couldn't arrive at anything definite, but I said that if he would agree to make me whole on the expense of driving them I would do what I could to help to get the shipment over that road. He said he would.

Defendant railroad company moved the court to strike out all of the last answer of the witness upon the ground that it was incompetent, irrelevant, and immaterial; that it was not shown that Williams had any authority to bind the company; for the further reason that it was not shown that the railroad company had anything to do with driving the cattle across the country to the Brogan ranch. The motion was overruled by the court; to which defendant railroad company excepted.

A. I would state as part of the agreement that I proposed that they should put in an unloading chute to the yards at Hartford; it was not fit to unload so many cattle, especially wild ones. He also agreed to do so and did. The chute is there now.

Q. Where was this agreement? Where were you when this agreement was made with Mr. Williams?

A. On the platform of the depot at Hartford.

Q. Who were present, if any one?

A. Captain Taylor, I. A. Taylor, and my son.

Q. Which son?

A. William, and the railroad agent at Hartford; both agents. At that time there were two, Mr. Barber and Mr. Collins.

Q. How many shipments of cattle were there?

A. There was two different shipments. The first was two trains, I think. The second shipment didn't come in for some time afterward, a month, probably.

Q. What time did the first shipment come?

A. About the 1st of May.

41 Q. How many trains were there in the first shipment?

A. I think two train-loads.

Q. What time did the second shipment come?

A. About the 1st of June; between the 1st and 10th, I think. I don't know the date—about a month later.

Q. What was the appearance of those cattle?

A. The cattle were very poor—in a poor condition.

Q. What sort of horns did they have?

A. Large horns.

Q. Had they the appearance of what we generally know as Texas cattle?

A. Yes.

Q. Do you know where they came from?

A. Not of my own knowledge, except what I learned from other parties.

Q. They were unloaded at Hartford, were they?

A. Yes, sir.

Q. Who took charge of them at Hartford?

A. Well, I did. I had my men take charge of them.

Q. What did you do with them?

A. We drove them to my meadow—a half section near town. They were so weak we could scarcely get them out of the yards. We had to keep them there awhile to recruit them up a little before driving them down.

Q. After that what did you do with them?

A. We drove them down to my ranch along the road—the public road—most of the way. There was some places where there was open prairie. There was only a few places where the prairie was open.

Q. Taking what course—which way from Hartford?

A. We drove west. I don't know as I can fully describe the route exactly. We drove west some three miles or four.

Q. We have that description from your son.

A. Yes, sir; he conducted the driving.

Q. Your son Joseph had charge of the driving?

A. Yes.

Q. To what place did you finally take them?

A. Finally took them to our ranch down on the Verdigris.

Q. In what county?

A. Chase county.

Q. Did the second shipment of cattle go to the same place?

A. Yes.

Q. Over about the same line of route?

A. About the same. There may have been some little variation. I couldn't say, but about the same route.

Q. What cattle, if any, were in that pasture down there?

A. There was 869 head that I had wintered already in the pasture and 300 that Mr. Montgomery had sent me from New Mexico—some part of New Mexico. They were shipped in some time before that and had been fed some in my pasture.

Q. What is Mr. Montgomery's first name? Do you remember?

A. I don't know.

Q. P. Montgomery?

A. Yes.

Q. He has a cross-petition in this suit for cattle lost?

A. I suppose he is the same man.

Q. Were there any other cattle—any native cattle—in that pasture?

A. These were all that I know of.

Q. Didn't Farrington and Lantry have some cattle?

A. There were the ones.

Q. Of these 800 how many died, if you know?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and for the further reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against the M., K. and T. Railroad Company. The objection was overruled by the court; to which defendant railroad company excepted.

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Q. Do you know how many died?

A. Why, not personally, by counting them, but in our figuring up in settlement I know there was 206 accounted for as dead.
Q. Of whose?
A. Farrington and Lantry's cattle.
Q. What kind of cattle were those?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and upon the further ground that there was a misjoinder and excess of parties defendant claiming affirmative relief against the defendant railroad company. The objection was overruled by the court; to which the defendant railroad company excepted.

A. They were Barr's C and C's.
Q. I mean as to quality.

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and for the further reason that there was a misjoinder and excess of parties defendant claiming affirmative relief againt defendant railroad company. The objection was overruled; to which defendant railroad company excepted.

A. At the time they died?
Q. Yes.
A. They were first-class Western cattle and almost ready for shipment; intended to be for shipment as fat cattle.
Q. Do you know as a matter of fact whether or not any considerable numbers of cattle died along the route taken by these Hozier cattle from Hartford to Chase county?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. I don't know personally, only what I learned from others.
Q. Didn't you see any dead along?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. I can't say I did. The fact is it was hardly safe for me to go along that route just then.
Q. You did hear something, then, of the Montgomery cattle over in the pasture. Do you know how many of them died?

Defendant company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. I can't say I did. The fact is it was hardly safe for me to go along that route just then.
Q. You did hear something, then, of the Montgomery cattle over in the pasture. Do you know how many of them died?

Defendant company objected to the question as incompetent,

irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. I don't recollect the number he claimed.
Q. Any considerable number?
A. Oh, yes; I couldn't state the exact number.
Q. Any considerable number?
A. Yes; quite a number.
Q. About what percentage would you say?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant company excepted.

A. I think over 100 of them died.
Q. Over what railroad did these cattle come to Hartford?
A. Over the M., K. and T. railroad.
Q. From what point, so far as you may know?
A. Why, I only know from Mr. Hozier that they were shipped from Midland, Texas.

Q. Do you know from what any of the employees of the
43 railroad company said?

A. Yes; Mr. Barber told me they were shipped from Midland. He is the agent at Hartford.
Q. These were the cattle which you engaged from Mr. Hozier to take from him that you spoke of early in your examination here?
A. Yes, sir.

Cross-examination by Mr. SEDGWICK:

Q. The talk that you had with Mr. Hozier about taking these cattle and the making of the contract was prior to your talk with Mr. Williams, wasn't it?
A. Yes.
Q. Also prior to your talk with Mr. Taylor?
A. Yes, sir.
Q. This contract which you made with Hoziers and which has been read here was made before you had any talk with either Mr. Williams or Mr. Taylor?
A. Yes, sir.
Q. Then, at the time you had this talk with Williams, you had already agreed with Hozier that, if he saw fit to deliver the cattle at Hartford, you would receive them and drive them across the country to Bazaar?
A. Yes; just as the contract states there. There is one thing that is stated, as I recollect, with regard to this contract as to driving the cattle. Mr. Hozier either said that or gave me the impression——
Q. You need not state anything Hozier said to you.
A. My understanding was from Mr. Hozier that the cattle would be shipped over the Santa Fe.
Q. How could they be shipped over the Santa Fe and stopped at Hartford?

A. It's merely put in. He said he might get better terms.

Q. It didn't make any difference to you whether they were shipped over the Santa Fe or the M., K. and T., so they were delivered at Hartford?

A. To save expense; that's all.

Q. If he selected a place and selected the town of Hartford as the place of delivery, would it not be as expensive if they came from one road as the other?

A. Just the same expense of driving.

Q. From whatever point you drove them this contract covered the driving of the cattle, didn't it, between you and Hozier?

A. Yes, sir.

Q. How long after the making of this contract was it before you had a conversation with Mr. Williams?

A. It was soon after, immediately after. I don't recollect just how long.

Q. Did you say your first conversation was with Williams or Taylor?

A. With Taylor.

Q. Do you know what position Taylor occupied in the service of the company?

A. He told me he was purchasing agent.

Q. He told you that?

A. Yes.

Q. That is all that you know about the position that he occupied, isn't it?

A. I don't know as I know anything outside except from the agent. He told me he was purchasing agent of the company.

Q. All you know about the position that Mr. Taylor occupied and his authority to act was simply what he told you himself and what the agent at Hartford told you?

A. Why, I think so.

44 Q. Did you understand or did you know whether the purchasing agent had anything to do with the traffic of the road?

A. He told me he had a right to make a contract for these cattle.

Q. Who told you that?

A. Mr. Taylor told me that.

Q. All you know about his right to make a contract that bound the company was what he himself told you?

A. Yes.

Q. What position did Mr. Williams occupy in the service of the company?

A. He was agent; stock agent of the road; told me so.

Q. Do you know what territory he was operating in?

A. I understood him to say he was agent on the branch that runs up through Hartford and Emporia.

Q. Do you know anything about the position he occupied outside of the statements that he himself made to you?

A. I have known Mr. Williams a good while as stock agent of the road, and I know that he transacted business with men who shipped cattle over the road.

Q. In what way did he transact business?
A. Got shipments.
Q. Solicitor for the road merely?
A. Yes; I suppose so, or agent.
Q. Do you know the extent of his authority?
A. I couldn't say for that.
Q. Did he claim to you that he had authority to make a contract of this kind?
A. Yes.
Q. He did?
A. Yes, sir.
Q. And did he make such a contract with you?
A. Yes, sir.
Q. Just give us the exact terms of that contract.
A. He met me on the platform after he got off the train. I think he was there before I came to the depot, and he asked me about the shipments. I don't recall his words exactly, and I told him about the position it was in; that I had heard from Mr. Hozier, and that I believed and understood from what he wrote that he was about contracting with the Santa Fe to have the shipments sent to Bazaar, and that I believed, if they would take proper steps, they could have that shipment over their road. He said he was very anxious to get the shipment. I said, "What I ask in this matter is that you pay the expense of driving from here to my pasture. I don't know what the cost might amount to. If you agree to make me whole on the expense of driving these cattle, I'll do what I can to get the shipment."
Q. I will ask you if before you ever talked with Mr. Williams you didn't write a letter to C. P. Rector, general freight agent of the road, telling him that Hozier Brothers, of Kansas City, were going to ship from Midland, Texas, and that you had a contract for taking care of these cattle, and telling Rector that if he wanted the cattle to come over the M., K. and T. he had better se- Mr. Hozier, of Kansas City.
A. No; I never wrote such a letter. I wrote to Mr. Cross telling him about the shipment.
Q. You did write such a letter to Mr. Cross then?
A. Yes, sir.
Q. Did you say anything in that letter to the effect that you must be made whole for the expense of driving the cattle across the country from Hartford to Bazaar?
A. Yes.
Q. If it should turn out on production of the letter that you made no such statement as that, then might you not be entirely mistaken in regard to all this talk you had with Williams?
A. It is impossible that I could be mistaken and I have proof that it took place.
45 Q. Who did you say was present when you had this talk with Williams?
A. My son William and Barber and Mr. Taylor.
Q. The only contract you made was with Williams?

A. Yes, sir.

Q. And he, you understood from his own statements, was stock agent of the company?

A. Yes, sir.

Q. And had authority to make the contract?

A. Yes, sir.

Q. You don't know, outside of his own statements, that he had any such authority?

A. Except from Mr. Taylor. He told me he had.

Q. Then, outside of the statements of Mr. Taylor and Williams himself, you don't know anything about what the extent of his authority was?

A. I don't know that it would be knowledge of his authority. My son and his partner there has shipped extensively over the road, and they have dealt with Mr. Williams, and they told me that he was an agent and acted for the company. That's all I know.

Q. Did you make any contract with Mr. Taylor?

A. I hardly know. I talked the whole matter over with him and I supposed that I could have made the contract with him. I believed it would be all right if I had. I believed it at the time, but he suggested to wire Williams to come up.

Q. Did you have any talk with Taylor after making the contract with Williams?

A. I don't recollect. I had some talk with him, as near as I recollect. He seemed to exult over the fact of getting the shipments.

Q. Mr. Taylor did?

A. Yes.

Q. Did you have any talk with him as to who had made the contract or who had the authority to make it, after your talk with Williams?

A. Yes; he said Williams had a right to make the contract with me.

Q. Didn't he tell you that Williams had exceeded his authority in making any such contract with you?

A. No; not to my recollection.

Q. Didn't he tell you that the company would not be bound by that contract, and that if anybody had to pay that money he himself would have it to pay?

A. No; no such thing.

Q. He didn't say anything of that kind to you?

A. No, sir.

Q. I will ask you if he didn't show you a letter that he had written to Mr. Rector, general freight agent of the road, and I will ask you to look at that letter and state whether or not that (indicating) is a copy of it.

A. I never saw this before.

Q. Read the letter and see if it is not a copy of one that he did show you.

A. He never read me any letter to that effect. He told me——

Q. Read the letter and see if that is the substance of what he told you then.

A. (Witness read letter indicated.)

A. No; he never asked me not to say anything to any one else or to any of the company.

Q. It is not, in substance, what he told you about the matter after you talked with Williams?

A. It is not in substance; it is partly. He told me that Rector was—well, was mad at him, was the way he said, because he thought he had infringed on his business by getting the shipments
46 for the road. I think that is as near as I can remember what he said. He never suggested even to me to keep the matter secret.

Q. Didn't Mr. Williams show the original of this letter to you?

A. I don't know what he did show me. I never read it. Mr. Williams had me ride on the train with him from Hartford to Rockeby. He tried to make me believe that he never agreed to pay me for driving the cattle; he tried to force that argument upon me and I told him he lied.

Q. Didn't he show you a letter?

A. He had a whole bunch of letters. His object was to try to get me to say he didn't contract to pay for the driving.

Q. Didn't Mr. Williams always say to you that he had never made any such contract?

A. No; he admitted it when I gave him my bill at Hartford to file.

Q. How long were these cattle kept at Hartford after being unloaded from the cars before being driven to Bazaar?

A. We drove them that same day.

Q. I will ask you to state to the jury who was present when these cattle were unloaded from the cars. I mean of those who were connected with the railroad company.

A. It would be hard to do. There was quite a crowd. It was on a Sunday. It seemed as though the whole town was gathered there.

Q. What employees of the railroad were there? Was Mr. Rector there?

A. Not that I know of.

Q. Was Mr. Williams there?

A. Mr. Sweeney was there.

Q. Was Mr. Williams there?

A. No; I didn't see him; Mr. Sweeney and Mr. Hunter.

Q. Do you understand that Mr. Hunter was connected with the railroad company?

A. I do—that is, with the inspection of the cattle.

Q. You understood he was working for the Government, didn't you?

A. He told me he was inspector.

Q. Did you understand that he was connected with the railroad company?

A. I believe so at the time.

Q. Did you believe so from statements made to you by Mr. Hunter?

A. He said that he was there when the cattle came in, and that he intended to examine their papers—permits—but that he failed to see them.

Q. That is, he failed to see them at Parsons?

A. Yes; and that he came up to Hartford after them. My impression—the impression that he gave me was that he was connected with the road.

Q. Did he examine the papers at the station of Hartford?

A. He said he did, and that they were all right. I asked him; I says, "Were these cattle all right?" "Yes," he says; "they are all right."

Q. Now, how far is it from the station of Hartford to your pasture, where you drove these cattle; your meadow?

A. It's about a mile and a half; a little over.

Q. They were driven out the same afternoon?

A. All we could *could* of them. They were strung all along the road; there was about fifty of them lying along the road.

Q. How long were they kept in your meadow before they were driven across the country to Bazaar?

A. They were there a few days; I don't recollect just how long; a part of them; but so many were so weak that we had to leave them there until the other cattle came in.

Q. I want to get at the length of time before you commenced to make the drive across the country.

47 A. I think about four days when we commenced to drive.

Q. How long were you driving the cattle from your meadow to the Bazaar pasture?

A. Four or five days. When I say four or five days that was only a portion of them. They were strung all along the road. It took us over a month to get them in. We didn't finally get them all in. We had to send men again and again to try to get them up and get them in.

Q. How many shipments of cattle were delivered at Hartford?

A. Two shipments.

Q. How many train-loads in each shipment?

A. I think two trains in the first shipment and I think but one in the other.

Q. How many cattle in all were delivered at Hartford?

A. I think 2,400 or 2,500. I couldn't say the number exactly; between 2,300 and 2,400, I think.

Q. Do you remember how many were in the first shipment?

A. There was 1,500 claimed to be shipped, but there was some lost, I don't know how many, along the road. There was a good many dead in the cars.

Q. 1,500 in the first shipment?

A. Yes, sir.

Q. How many in the second?

A. I don't recollect the number; somewhere between 600 and 800.

Q. Was Hunter there on the arrival of both shipments?
A. No; he was not the second time.
Q. Was Mr. Sweeney there on the arrival of the second shipment?
A. Not that I know of.
Q. Who was there connected with the railroad?
A. I don't know of any except the railroad hands.
Q. Did you examine the papers accompanying these cattle to see whether they were all right or not?
A. No, sir.
Q. Did you make any inquiry?
A. Except from Mr. Hunter and the second shipment, one of the Hozier Brothers came with them. I asked him and he said, "Yes; the papers were all right."
Q. What length of time elapsed from the time of the first shipment until the time of the second shipment?
A. It was about a month, more or less; somewhere about a month.
Q. How long were the cattle ought in by the second shipment kept in your meadow, if taken t e at all?
A. We drove them right out. There was an open pasture some distance. We drove them out to the open prairie.
Q. If Mr. Williams never had made this contract with you and Hozier had delivered you these cattle at Hartford, they would have been driven through the country just as they were driven under your contract with Mr. Hozier?
A. I suppose they would. But if I had not made this contract with Mr. Williams they would not have been unloaded at Hartford.
Q. Where would they have been unloaded?
A. At Bazaar.
Q. Would they have been shipped around this way?
A. No; they would have been shipped on the Santa Fe.
Q. If Mr. Hozier had elected to have the cattle unloaded at Hartford you couldn't have helped yourself?
A. They would not have been unloaded there if I had not made this agreement.
48 Q. If Mr. Hozier had elected to have the cattle unloaded at Hartford you couldn't have helped yourself?
A. I suppose I could not.
Q. Now, then, if he had unloaded the cattle at Hartford and Williams had not made this contract with you, which you say he did make, the compensation that Hozier was to pay you for taking care of the cattle would have been your compensation for driving them across the country?
A. I suppose it would.
Q. Then the agreement that Mr. Williams made with you made no difference as to the driving of the cattle across the country if Hozier had elected to have them delivered there at Hartford, did it?
A. I would state ag-in that they would not have been delivered at Hartford if I had not agreed with Mr. Williams.

Q. You have already stated that Mr. Hozier could have had them delivered at either one of these three places and you had got to take them?

A. He was then making the arrangement to have them shipped to Bazaar at the time that this agreement was made with Williams.

Q. Mr. Hozier had a right to have them shipped to Hartford?

A. Mr. Hozier informed me that he was on the way to the Santa Fe agent to make his contract when he met Mr. Donahue and placed his contract with the M., K. and T.

Q. Mr. Sedgwick asked to have the last answer withdrawn from the consideration of the jury.

By the COURT: Gentlemen of the jury, that answer is withdrawn.

Q. Now, you will please answer my question. If Mr. Hozier had ordered these cattle delivered at Hartford you would have had to take them and drive them across the country, just as you did, whether Williams made a contract with you or not?

Plaintiff objected to the question upon the ground that it was not proper cross-examination. The objection was sustained; to which defendant railroad company excepted.

Redirect examination:

Q. Do you know how it came about that Mr. Donahue, the freight agent of the M., K. and T. railroad at Kansas City, went to Mr. Hozier?

A. Mr. Williams wired him from Hartford—used the instruments himself—wired——

Defendant company objected to the answer.

Q. Now, you may state how it was that Mr. Donahue went to see Mr. Hozier about these shipments.

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant company excepted.

A. Mr. Williams wired Mr. Donahue to see Mr. Hozier and try to make the arrangement.

Q. How do you know that Mr. Williams sent such a telegram?

Defendant company objected to the question. The objection was overruled; to which defendant company excepted.

Q. You may tell what occurred in the office relative to this matter of informing Mr. Donahue.

Defendant company objected to the question. The objection was overruled; to which defendant company excepted.

A. He telegraphed to Mr. Donahue, from both what Mr. Taylor and I said, to go and see Mr. Hozier and secure the shipment for the M., K. and T. road.

Q. Was that after or before you made the arrangement with Mr. Williams?

A. After I made the arrangement with him. We came in
49 from the platform into the depot and he sat down and I gave him Mr. Hozier's address.

Q. Who was Mr. Donahue?

A. I don't know only what they told me. Mr. Taylor told me he was financial agent for the M., K. and T. railroad in Kansas City.

Q. He represented the M., K. and T. in some capacity in Kansas City?

A. He went to Mr. Hozier to secure the shipment for the railroad.

Q. At the time Mr. Hunter came up with the first shipment, or after the first shipment came in, did Mr. Hunter tell you that the cattle were all right or that the papers they held were all right?

A. He said the papers were all right and I think he said the cattle were all right—that is, as near as I can recollect. Mr. Sweeney was with him.

Q. Do you know what they came up for?

A. Yes; Mr. Hunter said he had failed to see the papers in Parsons and he came on up to see that they were all right.

Q. Are you anyways certain that Mr. Hunter said the cattle were all right?

A. I would not be certain, but I think he did.

Q. At least you judged from what Mr. Hunter said that the law had been complied with in reference to the matter, as far as his jurisdiction was concerned?

A. Yes; I understood so.

Defendant railroad company here moved the court to withdraw from the record and from the consideration of the jury all of the testimony given by Mr. Brogan in regard to the statements made to him by Mr. Taylor and Mr. Williams for the reason that it had not been shown that those men had any authority to act for the company or to bind it in any way whatever, and for the further reason that it was incompetent, irrelevant, and immaterial, and that there was a misjoinder and excess of parties defendant claiming affirmative relief against the defendant company. The motion was overruled; to which defendant railroad company excepted.

Q. When was it that Mr. Williams gave you that free ride up here and tried to convince you that this arrangement had not been made?

Defendant company objected to the words "free ride" in the question as assuming a fact not proven; which objection was overruled by the court; to which defendant R'y Co. excepted.

Q. When was that time?

A. It was a good while after I had put in my bill and tried to collect the expense of driving these cattle, and they refused to pay it, and finally——

Q. Was it after these suits had been brought; any of them?

A. It was after the fever had broken out, I think.

Q. After it was generally known that there was big damages over here?

A. Yes; I think it was about that time.

A. M. HUNTER was examined by Judge Cunningham and testified as follows:

Q. What official position did you occupy in the spring of '92, Mr. Hunter?

A. I was assi-tant inspector for the Bureau of Animal Industry.

Q. Where was your office?

A. Located at Parsons.

Q. You mean by that you were an assistant inspector in the employ of the United States?

A. Yes, sir.

Q. The Bureau of Animal Industry, connected with the Department of Agriculture?

A. Yes, sir.

Q. What were your duties as such inspector?

A. My duties at Parsons was in regard to quarantining Southern cattle—cattle that came out of the quarantine district.

50 Q. Where is Parsons located with reference to the line of road of the M., K. and T.?

A. It is located on the main line at the junction with this branch.

Q. The M., K. & T. has a branch line to the northwest, coming up the Neosho valley and passing through Hartford, and leaving the main line at Parsons.

A. Yes, sir.

Q. From Parsons has the road — line to the south?

A. Yes, sir.

Q. How far?

A. Well, I don't know how far.

Q. As far as you know?

A. It reaches down into Texas; I have never been down.

Q. Now, in your capacity as inspector, what did you have to do in reference to shipments of Southern cattle coming up the M., K. and T. railroad?

A. When a train of cattle came to Parsons on the M., K. and T. from the infected district, or from any other district for that matter, I was allowed to inspect the bills of the cattle that came into the office. If the bills showed these cattle were loaded in the infected district, or what we call south of the Government quarantine line, I stamped the bills with red ink across the face of the bills "Southern cattle." Then, as I understood, they are not unloaded at any place only in quarantine pens. They went to immediate slaughter.

Q. It was permissible for the railroad company to ship the cattle from the infected district, simply to run them through, or, if unloaded anywhere, to unload them in special pens?

A. Yes, sir.

Q. Your duty was to inspect those bills of lading and ascertain by that means where they came from and where they were going to.

A. Yes, sir.

Q. Were there any shipments came through Parsons from any point south in Texas to Hozier Brothers, at Hartford, along about the 1st of May?

A. Yes; there was a shipment made in Hozier Brothers' name, I believe it was. There was a shipment up the road, I think, about the 6th or 8th of May.

Q. The 1st of May?

A. Well, along there some time.

Q. Now, you may tell all you know about that matter relative to it.

A. I don't know very much about it. Well, sir, probably two weeks, maybe three weeks, before the shipment came we had word of the cattle going to be shipped from Midland, Texas, to Hartford, Kansas. It has not been customary to ship over that road that far without their being unloaded and fed at Ft. Worth, and I told Mr. Worth, I think it was, either he or the agent—Worth was the trainmaster—that if these cattle came up there and was unloaded at Ft. Worth that I would certainly have to demand of them to take them back. Before the cattle came I had instructions from our inspector at Kansas City, who superseded me, that this shipment would be made and they would be unloaded and fed at Ft. Worth in yards that had been cleansed for the purpose to receive these cattle and for me to O K the cattle. That settled it, as far as I was concerned, my authority. The cattle came on Sabbath morning and I O K'd the cattle. I don't think I went to see the cattle at all—I saw the bills—until they passed Parsons. After they passed Parsons Mr. Worth, the trainmaster, and I were standing on the siding,
51 talking. I told Mr. Worth that I thought probably there would be a little trouble in unloading those cattle up at Hartford, as they had had a little trouble before in some other load, and he made the proposition that we get onto the passenger train and catch up with them. We did so; started from Parsons at 11 o'clock and caught up with the cattle, I think, at Burlington or Strawn. We came on up to Hartford and waited for the cattle to come up. The cattle were unloaded at Hartford. Their papers were all right. They carried the certificate that they were unloaded and fed in disinfected yards at Ft. Worth, signed by the inspector that was placed there on purpose to do that work, and that took all the power away from me. If I had known the cattle, which I didn't, but if I had known the cattle I couldn't have stopped them.

Q. Why did you suggest to Worth that there might be trouble?

A. Simply because there had been some cattle shipped from some place down there—I don't recollect where—to Chetopa, and they had had some trouble in unloading them. The citizens, they said, didn't want them to unload them.

Q. For what reason?

A. Because they were afraid they would transmit the Texas fever, but there was none at Hartford. When we came up there everything was very quiet.

Q. Did you notice these cattle at any time?

A. I did when they were unloaded.

Q. Did you observe any ticks on them or about them?
A. Yes, sir.
Q. The ticks were to be seen by the naked eye?
A. I had mine naked.
Q. Did it require any close inspection to discover ticks on the cattle?
A. I don't think there was very many. My recollection is that I didn't observe very many. It has been a good while ago, but there was some ticks on the cattle, undoubtedly.
Q. Did you call the attention of any of the employees of the road to the character of these cattle and the probability or possibility of any trouble coming from their shipment there?

A. Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant company excepted.

Q. Now you may go on, if you did.
Q. At the time of unloading the cattle?
A. Yes; or any other time.
A. No; I don't think I did. On the road back to Parsons, my recollection is that it was on the way back we were talking about it, Mr. Worth and I——

Defendant company objected to the answer.

Q. When was this, Mr. Hunter?
A. That evening.
Q. You may tell what it was.

Defendant company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant company excepted.

A. Mr. Worth and I were talking about the cattle and about the probabilities of them transmitting the fever, and I told him it was my opinion that they would set the country afire.

Defendant objected to the answer. The objection was overruled; to which defendant company excepted.

A. I want you to understand, so far as my stopping the cattle officially, I couldn't do it, because my power was superseded by the inspector at Kansas City. I was ordered to do so & so and I had to do it.
Q. Which train was that?
A. The first two train-loads. There were two train-loads.
52 Q. Was it the first or second train-load of that first shipment?
A. I don't recollect. We unloaded one right after the other. They both got there at once.
Q. Do you know whether they passed through Parsons at the same time?
A. I believe they did. Both left there at the same time.
Q. If there had been no question about the safety of the shipment

of those cattle would you and Mr. Worth have followed up there the way you did?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was sustained; to which plaintiff excepted.

Q. At least you did have some conversation with Mr. Worth as to the question as to whether or not they were safe cattle to ship before you left Parsons, did you not?

A. I would not say positively whether it was with Mr. Worth or the agent, Mr. Coley; one of the two. I think, though, it was Mr. Worth?

Q. You say Mr. Worth was trainmaster at Parsons?

A. Yes.

Q. Of the M., K. and T.?

A. Yes, sir.

Cross-examination by Mr. SEDGWICK:

Q. You had no connection with the railroad company whatever?

A. No, sir.

Q. Your position was that of Government live-stock inspector?

A. Assistant.

Q. Assistant Government live-stock inspector?

A. Yes, sir.

Q. Who was your immediate superior?

A. Mr. Dean.

Q. Now, what territory was covered by Mr. Dean in his operations?

A. All the territory west of the Mississippi river.

Q. What was Dean's position?

A. His title was inspector.

Q. Who did he report to?

A. He reported to Dr. Salmon, I believe, at Washington city.

Q. Do you know who Dr. Salmon is?

A. He is chief of the Bureau of Animal Industry, at Washington.

Q. Under the Department of Agriculture?

A. Yes, sir.

Q. You reported to Mr. Dean?

A. Yes, sir.

Q. Now, in this conversation that you say you had with either Mr. Worth or the agent, at that time you had never seen the cattle, had you?

A. No, sir.

Q. At the time you told him that if the cattle were unloaded at Ft. Worth you would have to request him to take them back, then you never had seen the cattle?

A. No, sir.

Q. Did you understand at that time that the cattle were coming from a point outside of the Government quarantine lines?

A. Yes, sir.

Q. You understood they were such cattle as it was proper to ship north?

A. Yes, sir.

Q. At the time the cattle were unloaded at Hartford you didn't understand from any source that they had ever been inside of what was called the infected area down there?

A. Only as they came through it.

Q. By Ft. Worth?

A. Yes; came through there.

Q. I say you had no information or understanding that the cattle had ever been inside of it other than as they came thr-ugh on the cars?

A. No; I don't know that I did.

Q. Your duty was not to judge of the health and condition of the animal, but simply to see that all the requirements of the law had been complied with as to the papers?

53 A. Yes, sir.

Q. That was it?

A. Yes, sir.

Q. You knew nothing about Texas fever individually?

A. No; not more than anybody else.

Q. You couldn't stand off and look at an animal and tell whether he was infected with Texas fever or not?

A. No; I would not be supposed to know.

Q. All that you inquired into and all that your duty required you to look after as that the cattle came from outside of the infected area, and if they came from inside of the infected area to watch the cattle until properly delivered at slaughter pens?

A. Yes, sir.

Q. And, as far as anything you then knew, these cattle were proper cattle to be brought north?

A. The papers were all right.

Q. You knew nothing outside of them?

A. No; I wasn't supposed to know anything outside.

Redirect examination by Judge CUNNINGHAM:

Q. Did you hear Mr. Brogan's evidence?

A. Yes, sir.

Q. What did you state to Mr. Brogan relative to this?

Defendant company objected to the question. The objection was overruled; to which defendant company excepted.

A. I think I recollect telling Mr. Brogan that the papers were all right. I was talking with Mr. Brogan and went with Mr. Hozier back to the caboose and got the papers and looked over the second time from the time I seen them in Parsons, and I think I told Mr. Brogan that the papers were all right, but as to the health of the cattle I didn't say anything about that, because I was not in that business.

Q. Do you know anything about the June shipment?

A. I know they came through and the papers were all right.
Q. Under the same circumstances as the others?
A. Yes, sir.
Q. You didn't follow those up?
A. No, sir.

E. A. HOZIER was examined by Judge Cunningham and testified as follows:

Q. You are one of the defendants in this case?
A. Yes, sir.
Q. Who were the owners of these cattle that have been spoken of by the witnesses as having been shipped to Hartford?
A. Hozier Brothers—E. A. and George P. Hozier.
Q. How did you happen to be shipping to Hartford?
A. To fatten for the fall market.
Q. Where were they to be kept?
A. On the Brogan ranch.
Q. In Chase county?
A. Yes, sir.
Q. How did you happen to ship them to Hartford instead of Bazaar?
A. It was more direct for us to ship that way, and, as Mr. Brogan was to receive the cattle at Hartford the same as Bazaar, we shipped that way.
Q. With whom did you make the arrangement to ship over the M., K. and T.?
A. With Mr. Rector and Mr. Donahue, of the M., K. and T.
Q. Who are Mr. Rector and Mr. Donahue?
A. Mr. Rector, I think, was general freight agent of the railroad or connected with the freight department and Mr. Donahue was commercial agent at Kansas City.
Q. Did you have any contract with anybody else for these shipments besides the officials of the M., K. and T.?
A. No, sir.
Q. Where were these cattle to be shipped from?
A. From Midland, Texas.
Q. Did you have any contract with the Atlantic and Pacific for these shipments?
A. Nothing more than the regular shipping bills—bills of lading.
54 Q. I mean the Texas Pacific. They were simply put on the cars at Midland and brought over the Texas Pacifife to Ft. Worth and from there to Denison and so by way of the M., K. and T. to Parsons under your contract of shipment with Mr. Rector and Mr. Donahue?
A. Yes, sir.
Q. By what means were you to obtain the cars at Midland under your contract with these gentlemen? What were you to do?
A. We were to give our order to the agent for the cars, which we did.

Q. Were these gentlemen informed as to where your cattle were coming from?

A. Yes, sir.

Q. How many cattle had Hozier Brothers on the ranch in Texas?

A. About fifteen thousand.

Q. In what county was that?

A. Pecos county.

Q. How near the Pecos river was the headquarters of your ranch?

A. I think about six miles west of the Pecos river.

Q. How near the northwest corner of Valverde county?

Defendant company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled by the court; to which defendant company excepted.

A. I don't know the distance.

Q. Can you approximate to it?

A. Pecos county is quite a large county, and I think we are about the center of the county north and south. Valverde county is southeast.

Q. Is it on Independence creek?

A. Yes, sir.

Q. About how far from the mouth of Independence creek?

A. The ranch runs west from the mouth of Independence creek and takes in both sides of the creek.

Q. Have you ever been on that ground yourself?

A. Yes; we are fifty *n*iles north of the Southern Pacific road, and Valverde county is considerably southeast of the station where we ship.

Cross-examination by Mr. SEDGWICK:

Q. At what time did you have a talk with Mr. Donahue by which you claim you made a contract for the shipment of these cattle?

A. Some time in April. I don't remember the exact time.

Q. Do you remember the time you made a contract with Mr. Brogan to receive and pasture these cattle?

A. Yes; I don't remember the exact date. It was some time in April.

Q. Was your talk with Donahue, or rather your contract with Donahue, before or after your contract with Brogan?

A. It was after I had first seen Mr. Brogan; while I was figuring with Mr. Brogan, after I had decided to pasture with him.

Q. Was it before or after you had made this contract with Mr. Brogan?

A. It was before.

Q. At that time had you agreed with Mr. Donahue upon a rate for the shipment of these cattle?

A. I don't know as I had agreed with him. I had simply got the rate from him.

Q. Had you made final arrangements with him by which you were to ship cattle over the M., K. and T. at the time you made the contract with Mr. Brogan?

A. I am not right certain. I think so.

Q. You think you had made the final arrangement with Mr. Donahue?

A. Yes, sir.

Q. Are you pretty certain about that, Mr. Hozier?

A. Well, the whole transaction took place within a few days, and I rather think I had secured my pasture before I made the rate with the M., K. and T.

55 Q. How is that?

A. I am not right certain about that.

Q. I want to get at the question of whether your contract with Mr. Brogan was made first or the contract which you say you made with Donahue.

A. I rather think I made the contract with Mr. Brogan first.

Q. You rather think you made the contract with Brogan first?

A. Yes; being done about the same time, I don't just remember which was first.

Q. Who contracted for the shipment of these cattle?

A. Why Hozier Brothers.

Q. How long after making the contract with Mr. Brogan before you agreed with Mr. Donahue upon the rate?

A. Well, as I say, the agreements were made about the same time. I don't remember just the exact date or how long after.

Q. Did you have any talk with Mr. Rector?

A. Yes, sir.

Q. When was that with reference to the making of this contract with Mr. Brogan?

A. It was before I made the contract with Mr. Brogan.

Q. Now, you say you made the contract with Donahue?

A. Yes, sir.

Q. You may state just what that contract was and whether it was in writing.

A. It was not in writing. I got the rate from Donahue, and after a few days, when everything had been arranged so that I knew I wanted to deliver the cattle to Mr. Brogan, I told Mr. Donahue he could have the business.

Q. Now, all there was to that contract was that Donahue solicited of you the shipment of the cattle over the M., K. and T.?

A. Yes, sir.

Q. In other words, he requested you to route them over the M., K. and T.?

A. Yes, sir.

Q. Stating that he would make a certain rate if it was done?

A. Yes.

Q. That was all there was to that contract; you afterwardd told him you would do it?

A. Yes, sir,

Q. When you came to order your cars you ordered them of the Texas and Pacific railroad?

A. Under instructions from Mr. Donahue.

Q. Didn't he tell you he couldn't furnish them?

A. Yes.

Q. And that you would have to order them from the Texas and Pacific?

A. Yes, sir.

Q. Isn't it a fact that after that the contracts were made with the Texas and Pacific railroad for the shipment of these cattle?

A. I don't know what you call a contract. The bills of lading were made, I suppose, at Midland, where the cattle were loaded. I supposed they were simply bills of lading and not a contract.

Q. I will ask you if that (indicating) is not the signature of Hozier Brothers to this paper I now hand you, which is a paper dated Midland, Texas, June 10th, 1892, marked in the answer of the railroad company Exhibit "L" of the exhibits attached to the answer?

A. Yes; this is signed by one of the firm.

Q. I will ask you as to the next paper, which is a paper dated Midland, Texas, 4, 28, '92, attached to the defendant railroad company's answer and there marked Exhibit "A"——

A. Yes, sir.

Q. And the next paper also, which is dated Midland, Texas, 4, 28, '92, attached to the railroad company's answer and there marked Exhibit "B," and ask you if that signature is not the signature of Hozier Brothers.

A. Yes, sir.

56 Q. Also another paper dated Midland, Texas, April 29th, '92, and ask you if the signature thereto is not the signature of Hozier Brothers, this being a paper attached to the defendant railroad company's answer and there marked Exhibit "C."

A. Yes, sir.

Q. Also a paper dated Midland, Texas, April 5th, '92, attached to the answer of defendant railroad company and there marked Exhibit "D," and ask you if the signature thereto is not the signature of Hozier Brothers.

A. Yes, sir.

Q. What was the rate given you, Mr. Hozier, by Mr. Donahue?

A. Through rate?

Q. Yes, sir.

A. Sixty-five dollars a car.

Q. Did you understand that to be above or below the regular rate?

A. Well, I didn't know the regular rate. It was a less rate than we could have shipped to Bazaar.

Q. Why was it made less by Mr. Donahue?

A. I don't know that it was made less. I got a rate from him. I didn't know whether it was a cut rate or the regular rate.

Q. What was the rate to Bazaar?

A. They had no rate to Hartford, as I understood; they made it. I don't remember the rate to Bazaar; it was a little higher.

Q. Wasn't it $75.00 a car?

A. $72 or $75.

Q. It was about $70.00, wasn't it?

A. Yes, sir.

EXHIBIT "2."

KANSAS CITY, MO., *Feb.* 17, '93.

Mr. Jas. Donahue, commercial agent, Kansas City.

DEAR SIR: Your letter of 1st inst., with papers attached, received; have noted, as you requested, first and second, next attached. In second letter attached Mr. Hunt claims we know the condition of things at Fort Worth in regard to switching. In this he is mistaken. Now, in regard to this matter we have only this to say: We made a verbal agreement with you to haul our cattle from Midland, Texas, to Hartford, Kansas, we to have a through rate of $65.00 per standard car, nothing said about switching charges. If such charges were to have been made, you ought to have informed us at the time, as we were saving so little in shipping over your road, considering the long drive from Hartford to the pasture. We could have landed them within seven miles of the pasture over the other road and would only have had to pay an addition- 10 % for patent cars.

Now, gentlemen, we are entitled to all we ask for in this claim. The probabilities are we will ship about 1,000 head of cattle this spring from our ranch to the Indian Territory, and unless this matter is settled satisfactory at once we are afraid we cannot trade.

Yours truly, HOSIER BROS.,
Per L.

Q. You got the rate to Hartford from Mr. Donahue of $65.00 a car?

A. Yes, sir.

Q. What argument did you use with Mr. Donahue to procure that rate, or, in other words, why did he make you a less rate to Hartford than the regular rate to Bazaar?

A. I don't know why he made it. Mr. Brogan says we found we could deliver the cattle there as well as at Bazaar. For that
57 reason I thought we would save the difference in the shipment.

Q. Was anything said by you to Mr. Donahue that it would cost more to drive from Hartford and was a longer drive, and therefore he ought to make a less rate to you?

A. No, sir.

Q. Wasn't that taken into consideration by you and Donahue in talking over the rate?

A. No, sir.

Q. I will ask you to look at this letter which I now hand you and which is marked Exhibit "2," and I will ask you to state, Mr. Hozier, whose signature that is that is attached to that letter.

A. That was a letter dictated to me and signed by the party that wrote it.

Q. It is a letter from Hozier Brothers?

A. Yes, sir.

The letter identified by the witness was offered in evidence by defendant railroad company as part of the cross-examination of the witness. Judge Kellogg read the letter in evidence.

Q. At the time of writing this letter you didn't know that Mr. Brogan claimed to have made a contract by which the railroad company was to pay him for driving across the country, did you?
A. Only by what Mr. Brogan told me.
Q. In your contract with Donahue was the railroad to do anything else than to simply unload the cattle at Hartford?
A. No, sir.
Q. Was there any talk between you and Donahue that the railroad company should pay you or Brogan for the driving of the cattle?
A. No, sir.
Q. Where did the railroad company deliver the cattle to you?
A. They delivered the cattle at Hartford to Mr. Brogan.
Q. Who was Mr. Brogan? Was he your agent?
A. He was the man that owned the pasture, who was going to pasture the cattle and deliver them back to the station when we were ready to receive them.
Q. He was to do that as your agent, wasn't he?

Plaintiff objected to the question.

Q. Were you, personally, or any member of the firm of Hozier Brothers at Hartford at the time the cattle were delivered there by the railroad company?
A. Yes, sir.
Q. Was that true as to each of the shipments or only one of them?
A. I was there when the first shipment came in and my brother when the second shipment came in.
Q. They were received by you from the railroad company and put into Mr. Brogan's charge. Is that a fact?
A. Yes, sir.
Q. Each time?
A. Yes.

Redirect examination:

Q. This letter was written, I judge, at a time when you were having some controversy with the railroad company about switch charges?
A. Yes.
Q. They were trying to charge you up with more than $65.00 a car?
A. Yes, sir.
Q. By the excess of these switch charges?
A. Yes.
Q. That is the thing you were talking about in this letter?
A. Yes.

Plaintiff offered in evidence the deposition of D. G. Franks. See page 137 *et seq.*

Defendant railroad company objected to the reading of any question in the deposition as incompetent, irrelevant, and immaterial, and for the reason that there was a misjoinder and excess of parties defendant asking affirmative relief against the defendant railroad company.

58 The objection was overruled; to which defendant railroad company excepted. The deposition was read in evidence.

Defendant company objected to question 2 in the deposition as incompetent, irrelevant, and immaterial, and as calling for an opinion upon a subject in regard to which he was not competent to testify. The objection was overruled; to which defendant railroad company excepted.

Defendant company objected to question number 4 in the deposition as incompetent, irrelevant, and immaterial, and as throwing no light upon the issues. The objection was overruled; to which defendant company excepted.

Question number five was objected to by defendant railroad company as incompetent, irrelevant, and immaterial, and as throwing no light upon the issues in the case. The objection was overruled; to which defendant company excepted.

Question number six was objected to by defendant railroad company as incompetent, irrelevant, and immaterial. The objection was overruled by the court; to which defendant company excepted.

Defendant company objected to question number seven as incompetent and immaterial. The objection was overruled; to which defendant company excepted.

Question number eight was objected to by defendant company as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant company excepted.

Question number nine was objected to by defendant railroad company as immaterial. The objection was overruled; to which defendant company excepted.

Defendant railroad company objected to question number eleven as irrelevant and immaterial. The objection was overruled; to which defendant company excepted.

Question number fourteen was objected to by defendant railroad company as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant company excepted.

Plaintiff offered in evidence the deposition of Fred. Smart.

Defendant railroad company objected to each and every one of the questions and answers in this deposition as incompetent, irrelevant, and immaterial and for the reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant company. The objection was overruled; to which defendant railroad company excepted.

60 The deposition was read in evidence.

Question number three in the deposition was objected to by defendant railroad company as calling for an opinion which it was not shown that the witness was competent to give. The objec-

tion was overruled by the court; to which defendant company excepted.

J. J. BUCK testified as follows:

Q. Are you the attorney for the plaintiff that is spoken of in these depositions?
A. The same.
Q. And who examined on behalf of the plaintiff the two witnesses Smart and Franks?
A. The same; yes.
Q. Look at that map (indicating) and tell the jury whether that is the map that these witnesses referred to.

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. This is the map that I had and exhibited to them, and I saw them and the clerk who took the depositions write their names on it and I preserved it for the purpose of presenting it here.

The map identified by J. J. Buck was here offered in evidence by plaintiff. See Exhibit # 3, page 88.

(Here follows map marked page 59.)

Defendant railroad company objected to its introduction as incompetent, irrelevant, and immaterial. The objection was overruled by the court; to which defendant railroad company excepted.

J. C. FARRINGTON was examined by Mr. Dennis Madden, and testified as follows:

Q. State your name to the jury.
A. J. C. Farrington.
Q. Where do you reside?
A. Strong city, Kansas.
Q. You are one of the claimants in this lawsuit, are you?
A. Yes, sir.
Q. Have you been down in Texas at any time since you suffered this damage?
A. Yes, sir.
Q. When was that?
A. I think it was some time in June.
Q. This year?
A. Yes.
Q. Where did you go—to what county?
A. I went to Pecos county.
Q. Were you at Hozier Brothers' ranch down there?
A. Yes, sir.
Q. Will you describe that to the jury, as near as you can?

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Defendant company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled by the court; to which defendant railroad company excepted.

A. Well, the headquarters is located on Independence creek, about six miles from the Pecos river, and I should judge about halfway or midway of the county, north and south.

Q. How close was it to the line of Valverde county?

A. Well, I couldn't say; seventy-five miles, I should judge.

Q. What river or creek is it on, running through this pasture or ranch?

A. I saw no other creek but Independence creek.

Q. What does that creek run into?

A. It emptied into the Pecos river, about six miles from the head of it. The headquarters was right at the springs. The headquarters of this ranch was, from the springs, the head of Independence creek.

Q. Do you know how much of a ranch they had there—how many acres?

A. I couldn't say; they had something like forty miles square, I should judge.

Q. What direction did it extend, this ranch, from Independence creek?

A. Why, Independence creek, the headquarters, was, I
61 should judge, on the east side of the ranch there.

Q. Did the ranch extend south of the creek?

A. Yes; both ways, north and south, up and down the river.

Q. Was there any fence or obstruction to prevent cattle from going both sides of that creek?

A. I didn't see any.

Q. Did you notice the Pecos river in the other county, Valverde county? Was there any obstruction to hinder cattle going from one of those counties to the other?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and for the reason that it had not been shown that the railroad company had any knowledge of the situation. The objection was overrulee by the court; to which defendant company excepted.

A. I didn't see any in Valverde county. In fact, I wasn't in Valverde county, only as I went on the railroad.

Q. Between Pecos and Crockett?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and for the reason that the railroad company was not shown to have had any knowledge of the situation. The objection was overruled; to which defendant railroad company excepted.

A. I wasn't up as far as Crockett county.

Q. How far were you in Pecos county?

A. I got off the train at Dryden, and then we drove sixty or

sixty-five miles in a northeast direction to the ranch. I should judge that's the direction we drove in.

Q. Now, what obstruc-ion, if any, was there to prevent the cattle from running from Pecos county, where that ranch was, to Valverde county?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and for the reason that it was not shown that the railroad company knew anything in regard to the facts of the situation there. The objection was overruled; to which defendant railroad company excepted.

A. There wasn't anything that I saw.

Q. Did you see any cattle passing or crossing the Pecos river?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and for the reason that the railroad company had not been shown to have any knowledge of the facts or the situation there. The objection was overruled by the court; to which defendant company excepted.

A. I didn't see any cross. I seen places where they had crossed.

Q. From what points?

A. From the mouth of Independence creek.

Q. From where this ranch was located?

A. Yes, sir.

Q. Where were those points?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and for the reason that it had not been shown that the railroad company knew anything about the facts or the situation there. The objection was overruled by the court; to which defendant railroad company excepted.

A. Well, right here at Independence creek, right here at the mouth of this creek, here where it empties into the Pecos river.

Q. You saw the cattle crossing there, did you?

S. I didn't see them crossing. I seen where they had crossed—the paths.

Q. Show the jury on that map where that ranch is.

A. It is on this creek (indicating on the map).. These are springs which head this stream.

Q. Does the ranch join the Pecos river?

A. Yes; it runs clear to the Pecos river. The Pecos river
62 is the boundary line.

Q. The boundary line of that ranch?

A. Yes; on the east.

Q. What kind of a river is this with reference to depth?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled by the court; to which defendant company eccepted.

Q. What is the depth and size of that river?

A. Well, the river—I don't know the depth of the water. I would

not be able to say; but the river bed is probably thirty-five to fifty feet wide, and from bluff to bluff is probably a mile wide in places; runs from half a mile to a mile between the bluffs.

Q. You noticed fords, you say, on that river?

A. I saw riffles—places where they could cross.

Q. Were there any fences along that river?

A. I didn't see any at all.

Q. What was the kind of country there with reference to high or low land?

Defendant company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. It was a very rough country; rather bluffy; cañons, quite large cañons.

Q. What other watering places did you notice in Pecos county or Valverde county for cattle to water that were kept in either of those counties or on the edge of either?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant company excepted.

A. None; only what was supplied by wind pumps. Most of them were out of repair while I was there.

Mr. John Madden, for plaintiff, offered in evidence the deposition of H. H. Henry. Defendant railroad company objected to the entire contents of the deposition upon the ground that it was incompetent, irrelevant, and immaterial for all the purposes of this case, and because there was a misjoinder or excess of parties defendant claiming affirmative relief against this defendant, and that defendant Henry could not prove his claim in this case against this defendant, and that this jury is incompetent to pass on or consider same.

The objection was overruled; to which defendant company excepted.

The deposition was read in evidence by Mr. Madden.

Question one in the deposition was objected to by defendant railroad company as incompetent, irrelevant, and immaterial and as not tending to throw any light upon the issues in the case, having no reference to any cattle of the plaintiff that may have been injured. The objection was overruled; to which defendant company excepted.

Plaintiff offered in evidence the deposition of defendant B. G. Baysinger. Defendant railroad company objected to the deposition and to each and every question and answer therein for the reason that it was incompetent, irrelevant, and immaterial *and* all purposes of this case, and because there was a misjoinder or excess of parties defendant claiming affirmative relief against this defendant, and because defendant Baysinger could not properly prove up his claim against defendant company in this case, and that the jury was incompetent to pass on or consider same.

The objection was overruled; to which defendant company excepted.

The deposition was read in evidence by Mr. Madden.

63 Plaintiff offered a second deposition of H. H. Henry. Defendant railroad company objected to each and every question and answer contained in the deposition as incompetent, irrelevant, and immaterial for all the purposes of this case, and in addition defendant company made same objection as was made to deposition of defendant Baysinger last above.

The objection was overruled by the court; to which defendant railroad company excepted.

The deposition was read in evidence by Mr. Madden.

Plaintiff offered in evidence the deposition of J. L. Stratton.

Defendant railroad company objected to the deposition and to each and every question and answer contained therein for the reason that it was incompetent, irrelevant, and immaterial, and in addition defendant company made same objection as was made to deposition of defendant Baysinger above. The objection was overruled; to which defendant railroad company excepted.

The deposition was read in evidence.

Defendant railroad company objected to question one as incompetent, irrelevant, and immaterial, and for the further reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company. The objection was overruled by the court; to which defendant railroad company excepted.

Plaintiff offered in evidence the deposition of W. A. Piese. Defendant railroad company objected to the deposition and to each and every question and answer therein for the reason that it was incompetent, irrelevant, and immaterial *and* for all the purposes of this case, and in addition made same objection as was made to deposition of defendant Baysinger herein. The objection was overruled; to which defendant railroad company excepted.

The deposition was read in evidence.

Plaintiff offered in evidence the deposition of John Hawk.

Defendant railroad company objected to the introduction of this deposition and to each and every question and answer contained therein for the reason that it was incompetent, irrelevant, and immaterial for all the purposes of this case, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad excepted.

The deposition was read in evidence.

Plaintiff offered in evidence the deposition of G. E. Welch. Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial for all the purposes of this case, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted.

The deposition was read in evidence.

Plaintiff offered in evidence the deposition of A. G. Shepard.

Defendant railroad company objected to the deposition and to every question and answer therein for the reason that it was incompetent, irrelevant, and immaterial for all the purposes of this case, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted.

The deposition was read in evidence.

Plaintiff offered in evidence the deposition of A. A. Wilson.

Defendant railroad company objected to the introduction of the deposition and to each and every question and answer in the deposition for the reason that it was incompetent, irrelevant, and
64 immaterial for all the purposes of this case, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant company excepted.

The deposition was read in evidence.

Plaintiff offered in evidence the deposition of D. B. Stigner.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial for all the purposes of this case, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted.

The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Felix Thompson.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial for all the purposes of this case, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant company excepted.

The deposition was then read in evidence.

Plaintiff offered in evidence the deposition of Bruce Hunt.

Defendant railroad company objected to each and every question and answer contained in the deposition as incompetent, irrelevant, and immaterial for all the purposes of this case, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which the defendant railroad company excepted.

Plaintiff offered in evidence the deposition of S. R. Resor.

Defendant railroad company objected to each and every question and answer contained in the deposition for the reason that it was incompetent, irrelevant, and immaterial for all the purposes of this case, and for the further reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad excepted.

The deposition was here read in evidence.

Plaintiff offered in evidence the deposition of O. P. Rail.

Defendant railroad company objected to the deposition and to each and every question and answer contained therein as incompetent, irrelevant, and immaterial, and for the reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad company excepted.

The deposition was here read in evidence.

The deposition of E. G. Holt was offered in evidence by plaintiff.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and for the further reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against the defendant railroad company, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant company excepted.

The deposition was read in evidence.

Defendant company objected to question number 1 in the deposition as incompetent, irrelevant, and immaterial, and for the reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company,
65 and for the further reason that the witness was not competent to testify. The objection was sustained; to which plaintiff excepted.

Defendant company objected to question number 2 in cross-examination of this deposition upon the ground that it was incompetent, irrelevant, and immaterial; that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company, and that the witness was not competent to testify. The objection was sustained; to which plaintiff excepted.

Defendant company objected to question 3 on cross-examination as incompetent, irrelevant, and immaterial, and for the reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company, and that the witness was not competent to testify. The objection was sustained by the court; to which plaintiff excepted.

Defendant company objected to question number four on cross-examination upon the ground that it was incompetent, irrelevant, and immaterial; that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant company, and that the witness was not competent to testify. The objection was sustained by the court; to which plaintiff excepted.

Defendant company objected to question number five on cross-examination for the reason that it was incompetent, irrelevant, and immaterial; that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant company, and that the witness was not competent to testify. The objection was sustained by the court; to which plaintiff excepted.

Plaintiff offered in evidence the deposition of G. T. Collins.

Defendant railroad company objected to each and every question

and answer in the deposition as incompetent, irrelevant, and immaterial for all the purposes of this case, and for the reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad company excepted.

Defendant railroad company objected to question number one in the deposition as incompetent, irrelevant, and immaterial. The objection was sustained; to which plaintiff excepted.

Defendant railroad company objected to question number two in the deposition as incompetent, irrelevant, and immaterial. The objection was sustained by the court; to which plaintiff excepted.

Defendant railroad company objected to question three as incompetent, irrelevant, and immaterial. The objection was sustained by the court; to which plaintiff excepted.

Defendant railroad company objected to question number four as incompetent, irrelevant, and immaterial. The objection was sustained; to which plaintiff excepted.

Plaintiff omitted the depositions of Francis Brogan, E. J. Barberry, Joseph Aldrich, S. J. Bixler, and W. J. Spencer.

Plaintiff offered the deposition of Joseph N. Brogan. Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial for all the purposes of this case, and for the further reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant company excepted.

The deposition was read in evidence.

66 Defendant railroad company objected to question number one in the deposition as incompetent, irrelevant, and immaterial, as not tending to throw any light upon the issues in the case and as relating to facts taking place after the cattle left the line of road. The objection was overruled by the court; to which defendant railroad company excepted.

Plaintiff offered in evidence the deposition of Howard Rhodes. Defendant railroad company objected to each and every question and answer in the deposition upon the ground that it was incompetent, irrelevant, and immaterial so far as the defendant railroad company was concerned, and for the further reason that there was a misj-inder and excess of parties defendant claiming affirmative relief against defendant railroad company. The objection was overruled by the court; to which defendant company excepted.

Plaintiff offered and read in evidence the deposition of William A. Rogers. Plaintiff then offered in evidence the deposition of W. J. Spencer, which it was stated was omitted.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and for the further reason that there was a misjoinder and

excess of parties defendant claiming affirmative relief against defendant company. The objection was overruled by the court; to which defendant company excepted.

Plaintiff offered in evidence a map which was marked Exhibit "4." Plaintiff offered in evidence the deposition of George Terrel.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad company excepted.

The deposition was read in evidence.

Plaintiff offered in evidence the deposition of James Hitton.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial. The objection was overruled by the court; to which defendant railroad company excepted.

The deposition was read in evidence.

Plaintiff offered in evidence the deposition of F. G. Soule.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted.

The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Michael Yanger.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Isaac Hawbecker.

Defendant railroad company objected to the introduction of this deposition and to each and every question and answer therein as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Joseph Kuhlman.

67 Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Joseph Strutzel.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of G. E. Bodine.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of John Schrader.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

By the COURT to the jury: You may disregard any testimony given by these men in these depositions as to what the disease was. It is proper for them to state what the symptoms were.

Plaintiff offered in evidence the deposition of Joe Wagoner.

Defendant railroad company objected to each and every question and *a* answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Anthony Kuenne.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Matt. Swarager.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Sam. McKee.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was then read in evidence.

Plaintiff offered in evidence the deposition of Mathias Marren.

Defendant railroad company objected to each and every
68 question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection

was overruled; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Harry L. Soule.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of L. W. Ostrom.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Adam Bitler.

Defendant railroad company objected to each and every question in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger.

The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of J. F. Stratton.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Charles Haber.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Grif. Jones.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of E. W. Everetts.

Defendant railroad company objected to each and every question and answer in the deppsition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of John L. Oleson.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger.

69 The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of M. L. Oleson.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger.

The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of F. M. Nine.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Phillip Davis.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which fendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of O. L. Oleson.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of J. W. Osborne.

Defendant railroad company objected to each and every question and answer in the deposition as immaterial, irrelevant, and incompetent, and also made same objection as was made to deposition of witness, defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Defendant railroad company asked the court to strike out that portion of the deposition wherein he presumed to give his opinion as to the disease. The objection was sustained by the court; to which plaintiff excepted.

Defendant railroad company objected to that portion of the deposition about shipping the cattle before they got fat as incompetent, irrelevant, and immaterial, and as not tending to show any proper

measure of damages. The objection was sustained; to which plaintiff excepted.

That part of the deposition, beginning at page 11, where J. W. Osborne was recalled, was read by plaintiff.

Defendant railroad company objected to the expert testimony given by the witness J. W. Osborne upon the ground that no foundation had been laid and witness was not shown to be competent. The objection was overruled by the court; to which defendant railroad company excepted.

Defendant railroad company asked the court to strike out all his testimony wherein he testified as an expert.

By the COURT to the jury: That last part may be stricken out where he says "it is regarded amongst cattlemen as a fact."

The portions of the deposition to which objections were made were marked by the attorneys.

70 Plaintiff offered in evidence the deposition of John R. Maddox.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad company excepted.

The testimony as to the steers that were sick was withdrawn for the reason that that claim had been settled.

Plaintiff offered in evidence the deposition of J. W. Ketcham. Defendant railroad company objected to each and every question and answer in this deposition for the reason that the same was incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of J. W. Bolton.

Defendant railroad company objected to each and every question and *and* answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad company excepted.

Plaintiff offered in evidence the deposition of J. K. Emley.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of E. T. White.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of John Patch.

Defendant railroad company objected to each and every question and answer in the deposition for the reason that the same was incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of J. P. Rozillian.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Mary Conway.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of D. H. Gand.

Defendant railroad company objected to each and every
71 question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger.

The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of J. G. Hughes.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger.

The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of H. C. Jackson.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger.

The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of John Langley.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of J. W. Van Cleave.

Defendant railroad company objected to each and every question

and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of J. C. Van Cleave.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted.

Plaintiff offered in evidence the deposition of John Stotler.

Defendant railroad co-pany objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Pat. McCormick.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger.

The objection was overruled by the court; to which defendant railroad company excepted.

Plaintiff offered in evidence the deposition of W. H. Watkins.

Defendant railroad company objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger.

72 The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Jane Jones.

Defendant railroad objected to each and every question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Plaintiff offered in evidence the deposition of Geo. M. Scoggins.

Defendant railroad company objected to the deposition and to each and every question and answer in it as incompetent, irrelevant, and immaterial, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence. Plaintiff read none of page 2 of the deposition and commenced to read against at question 3, on page 3.

Defendant railroad company objected to any evidence as to what it was worth to bury cattle that died as incompetent, irrelevant, and

immaterial, and not pertaining to any issue to be tried in this case. The objection was overruled; to which defendant railroad company excepted.

Defendant railroad company objected to the answer in the deposition which was in answer to the question as to how much it was worth to bury cattle, because the answer was not responsive to the question. The objection was sustained; to which plaintiff excepted.

Plaintiff omitted questions 5 and 6 and read nothing from there on.

Plaintiff offered in evidence the deposition of Winnie Baysinger.

Defendant railroad company objected to each and every
125 question and answer in the deposition as incompetent, irrelevant, and immaterial, and in addition made the same objection as was made to deposition of defendant Baysinger, first appearing herein. The objection was overruled by the court; to which defendant railroad company excepted. The deposition was read in evidence.

Defendant railroad company objected to the testimony in this deposition as to what it was worth to bury the dead animals. The objection was sustained by the court; to which plaintiff excepted.

Plaintiff read the testimony of Winnie Baysinger when he was recalled.

Defendant railroad company made same objection; which was overruled and excepted to.

73 *Depositions.*

Q. State your name, age, place of residence, and occupation?

A. John L. Olson; I am 44 years old; Neosho Rapids, Lyon county, Kansas; I am a stock raiser and farmer.

Q. Are you one of the members of the firm of Olson Bros.?

A. I am.

Q. Did the farm of Olson Bros. lose any cattle in the summer of 1892? If so, state the number, kind, and value of the same and of what cause they died.

A. Yes; they lost 31 head, mixed herd; 8 three-year-old steers, worth $37.50 apiece; 10 two-year-old steers, worth $25.00 apiece; 6 fat cows, worth $25.00 apiece; 2 milk cows, worth about $18 apiece; 2 two-year-old heifers, worth $14 apiece; 2 one-year-old steers, worth $15 apiece; 1 one-year-old heifer, $12; caused by Texas fever.

Q. Give the numbers of the land where the home ranch of the Olson Bros. *Bros.* is situated.

A. On the southwest quarter (¼) of section 30, 19, 13.

Q. State where your herd of cattle ranged during the early portion of the summer of 1892?

A. Well, they ranged right south of M., K. and T. R'y, on section- 6 and 7 mostly.

Q. State whether or not you know, as a matter of fact, that they ranged as far south as the trail taken by the Hozier Bros. cattle in going west from Hartford, Kansas; and, if you do know it, state the means of your knowledge.

A. Yes; they went down across the land and were in the habit of ranging down there, and I saw the herd down there the day after the quarantine was established. Some one who said he was in charge of the quarantine line, a man by the name of Mowser, refused to let me drive my cattle away.

Q. About how long thereafter was it before your cattle returned to the home range?

A. Something like three or four days.

Q. How long after their return before they commenced dying?

A. As far as I can remember, it was about two or three weeks.

Q. State the symptoms that they exhibited prior to their death.

A. They would stop their grazing and drinking and commence to stay behind the herd, drop their head down, and their ears would droop, and slobbering at the mouth; they would be a wobbling with their hind parts and in some cases would fall down, and when they did fall down they could not get up again.

Q. How many cattle did you have altogether again in the herd?

A. I could not state the amount, but there was about 40 head, as near as I can remember, that went down on this trail.

Cross-ex. by Mr. DICKSON:

Q. What character of cattle were those that you lost, with respect to being western cattle or domestic cattle?

A. They were domestic cattle raised by ourselves.

Q. What experience, if any, have you had with Texas fever before your cattle became sick and died?

A. Well, I saw some others that had Texas fever some years ago.

Q. Where was it?

A. At Neosho rapids; my uncle had some that died of the fever.

Q. How did you know that the cattle of your uncle died of Texas fever?

A. They said it was Texas fever; a man drove a yoke of Texas oxen through.

Q. Do you know anything about what authority this man Mowser had except what he said?

74 A. No. I only know what he said he was appointed by the justice.

Redirect by Mr. CUNNINGHAM:

Q. Did you notice any ticks on the cattle of yours that were sick or that died?

A. They were full of ticks, those that died, and there was some ticks on those that were sick and did not die, but not so many.

Q. What was the condition of these cattle of your herd as to being healthy or otherwise prior to the time that they came home, as you say, from having ranged over and along the trail taken by the Hosier Brothers cattle—that is to say, whether they were healthy or in good condition.

A. All of our cattle were healthy, those especially were in the best of condition.

JOHN L. OLSON.

M. L. OLSON, also being called, testifies as follows:

Q. State your name, age, residence, and occupation.

A. M. L. Olson; age, 37. I live at Neosho Rapids, Lyon county, Kansas. I am a farmer and stock raiser. I am one of the firm of Olson Brothers.

Q. State if the firm of Olson Bros. lost in the summer of 1892 any domestic cattle; and, if so, state the numbers, kinds, and value of the same, and of what disease they died?

A. Yes; we lost some cattle; there was thirty-one head. I have heard the testimony of my brother, John L. Olson, and agree with him as to the number, kind, and value of the cattle that we lost. They died of Texas fever.

Q. Prior to their becoming sick with this disease, state whether or not these cattle were in a healthy condition.

A. Yes, sir; they were in a healthy condition.

Q. How many cattle were there altogether in your herd that ranged over and along the trail taken by the Hosier Bros. cattle in going west from Hartford, Lyon county, Kansas?

A. There was about 60 or 70 head out that could go down there.

Q. State whether or not you ever saw your herd of cattle or any portion of it down upon this trail. If so, state the time.

A. Well, I have seen them there lots of times. I saw a bunch of them there the last of May or the first of June.

Q. How soon after seeing that bunch of cattle on that Hosier cattle trail did any of your cattle begin to die?

A. I could not say just when; it was in August of 1892 that they began to die.

Q. If you saw these cattle sick, please state the symptoms of that sickness.

A. Well, sir, the first symptoms was that they would quit eating and drop their heads down between their forefeet, then fall back in the herd, keep behind, then after lie down, and would not go along at all, and whenever we would drive them up they would wobble.

Cross-examined by Mr. DICKSON:

Q. Did you see the Hosier cattle being driven from Hartford west?

A. No, sir, I did not see them.

Q. Do you know anything about the road that they were driven over except what you have been told by other persons?

A. No, sir, I did not.

Redirect by Mr. CUNNINGHAM:

Q. Calling your attention to the map of Lyon county, marked by the notary with his initials, state whether or not the red line thereon marked extending west from Hartford is the line, as
75 you understand it, over and along which these Hosier Bros. cattle were driven on their way to the Brogan ranch.

(Objected to as leading.)

A. Yes, sir; this is the line.

M. L. OLSON.

Also F. M. NINE, being duly sworn, testifies as follows:

Q. State your name, age, place, and occupation.

A. F. M. Nine; I am 28 years old; I live at Neosho Rapids, Lyon county, Kansas; I am a farmer.

Q. State whether or not during the summer of 1892 you lost any cattle of any contagious disease. If so, state the kinds, number, and values and the disease of which they died.

A. Yes, sir; I lost some cattle in the summer of 1892. I lost 5 head, 4 cows and one yearling heifer. They were worth $125 altogether. They died of Texas fever.

Q. Are you acquainted with the value of cattle in your neighborhood as they were in the summer of 1892?

A. Yes, sir.

Q. State whether or not these cattle were healthy prior to their taking this disease; also state what kind they were.

A. They were healthy. They were native cattle.

Q. State whether or not they ranged over and along the trail and on the ground where Texas cattle of the Hosier Bros. were driven or herded.

A. They did. They ranged with Olson Bros.' cattle.

Q. State the symptoms of these cattle when they would take this disease.

A. There was great fever, loss of appetite, droopish, and with great weakness. There was a good many of them that would pass blood.

Q. Do you know of the death of any cattle in your neighborhood of this disease except those who were exposed by going upon the road or pastures where the cattle of the Hosier Bros. had been?

A. I do not.

F. M. NINE.

Also PHILLIPS DAVIS, being called, who had been sworn to testify the truth, the whole truth, and nothing but the truth, testifies as follows:

Q. State your name, age, place of residence, and occupation.

A. My name is Phillip Davis; I am 60 y'rs old; I live on section 31, 19, 13, southwest quarter; I am a farmer.

Q. State if you lost in the summer or fall of 1892 any cattle of any contagious disease; and, if so, state the numbers and kind, value, and the disease of which they died.

A. I have lost five head, three two-year old steers and two milk cows; steers were worth $25 per head; cows worth about $20.00 per head. They died of Texas fever.

Q. State whether or not you knew of the value of cattle in your neighborhood at the time those cattle of yours died.

A. Yes, sir; I knew the value of the cattle at that time.

Q. State whether or not these cattle of yours ranged to the south of where you lived and as far as a line west directly west of the south line of Hartford, Lyon county, Kansas, during the early summer or late spring of 1892.

A. Yes; they ranged south of that line and north of that line both.

Q. State the symptoms shown by these cattle as they became sick and died.

A. They seemed drooping; head dropped down; also the ears; they seemed weak.

Q. State whether or not you ever saw prior to this time any cattle die of Texas fever.

A. Yes, sir; I have.

76 Q. State whether or not these cattle died in your neighborhood in the summer of 1892 exhibited the same symptoms like those you have seen previously die of Texas fever.

A. The symptoms were about the same.

Q. Were there any cattle in your neighborhood that had the Texas fever besides those that ranged down as far south as a line west from the south part of Hartford?

A. No; there was not.

Q. State the names of the owners of the cattle that you saw as far south as a line drawn west from Hartford that reside in your neighborhood, if you saw any.

A. I saw the cattle of F. M. Nine. I saw some of the Olson Bros. there. I saw some of Wash Phillips and my own cattle.

PHILLIP DAVIS.

Also O. L. OLSON, being duly sworn and called for the plaintiff, testified as follows:

My name is O. L. Olson; my age is 42 y'rs of age; I live close to Neosho Rapids, Lyon county, Kansas; I am a member of the firm of Olson Bros., who lost cattle by Texas fever; I heard the testimony given by John Olson, of our firm, and state that the same is correct.

Q. How many of the cattle lost by the Olson Bros. of Texas fever were buried by the firm?

A. About 29 head.

Q. Do you know what it is worth per head on an average to bury these cattle?

A. Yes; I know.

Q. How much was it?

A. At least two dollars per head.

O. L. OLSON.

Also J. W. OSBORN, being duly sworn to testify the truth, the whole truth, and nothing but the truth, testifies as follows for the plaintiff and all those that claim cattle by Texas fever—

And says that he is one of the firm of Osborn and Carson, and that said firm lost fifteen head of cattle by Texas fever in the summer of 1892; besides said fifteen head said firm had 79 head that were exposed.

Q. State how that 79 head were affected by the Texas fever.

A. We shipped them here from Colorado about the 20th of June

when we shipped them to Jessies Stratton, and they had to cross and did cross the trail of the Hosier cattle.

Q. How many, if any, of those cattle died of Texas fever?

A. Fifteen head.

Q. How long have you handled cattle, and what has been your experience and knowledge of cattle as to values?

A. I have handled cattle for the last fifteen years buying and selling.

Q. What were the fifteen head that died worth?

A. I think they were worth $50.00 per head.

Q. You may describe them.

A. They were good Col. cattle, 4 years old steers. They were hay-fed cattle, and would weight 1,100 apiece when I got them in Colorado.

Q. Of the 79 head that did not die state how they were affected.

A. Well, there was several of them sick. I do not know how many had to ship.

Q. If you shipped any of them earlier than business would have suggested, state the fact and why you did it.

A. Yes; there was three car-loads of them shipped. We shipped before we were ready on account of the fever. They were shipped before they were fat.

77 Q. Do you know how much you ost on those you shipped? If so, state it.

A. Well, I think it was a little over $1,400.00.

Q. How many head did you ship because of this Texas fever?

A. I had to ship them all, the 79 head.

Q. Why did you have to ship them?

A. Because they got sick with the Texas fever.

Q. You may state if you buried these that died or had them buried.

A. Mr. Stratton buried them. We paid him for it. We paid for burying them two dollars per head, which, I think, was a reasonable price.

Cross-examined by Mr. DICKSON:

Q. When did you begin shipping the cattle that you shipped?

A. I could not tell exactly without looking at the bills.

Q. Was any of your cattle sick or did any of them die before you commenced to ship?

A. No, sir.

Q. Were those that you did not ship as ready to ship as those that you did ship?

A. Yes, sir; they were all the same, except one load of cattle, 20 head.

Q. Did you ship those cattle principally because you were afraid they would be taken sick?

A. Yes, sir.

Q. When would you have shipped them if it had not been for that?

A. They would not have been ready until October.

Q. How were prices in October compared with the prices at the time that you did ship?

A. Prices were fully as good and the cattle had gained 150 lbs. It was some time in July that we shipped our cattle and a few days after the first cattle died of Texas fever. We heard of the cattle being quarantined is the reason that we shipped them.

Redirect by J. JAY BUCK:

Q. Were the cattle that you shipped to avoid quarantine equally exposed to the Texas fever with those of your cattle that died from that disease?

A. They were all the same.

J. W. OSBORN.

J. W. OSBORN, being recalled, testifies as follows:

Q. State if you saw the Hosier Bros. cattle and state what you have to say as to their having ticks on them. State fully.

A. Yes; I saw some of the scattering cattle of the Hosier brand; they had ticks all over them. I am familiar with Texas cattle and the disease which they communicate, and state that where cattle come from a low latitude in a warm country they will be likely to have ticks on them and will be sure to communicate the disease called Texas fever, and that it is regarded among cattlemen who are familiar with Texas cattle is a very sure indication that they will communicate the Texas fever and always raises a suspicion of the safety of such cattle.

J. W. OSBORN.

Q. State your name, age, place of residence, and occupation.

A. My name is John R. Maddox; I am 55 y'rs of age; I reside in Emporia township.

Q. Do you know the trail over which the Hosier Bros. cattle were driven from Hartford to the Brogan ranch, where it passed through your section of the country?

A. Yes; I do; in my immediate neighborhood.

Q. State whether or not you lost any animals from the Texas fever in the summer of 1892.

A. I did.

Q. Describe them.

A. I lost one. He was a pale-red steer; three past, coming four.

Q. About what would he weigh?

A. I believe at the time about 1,400.

78 Q. Do you know the market value of such an animal at your place at the time that steer died?

A. I do not know as I remember now, but I considered that steer worth about $50 or $60.00.

Q. When did your animal take sick?

A. He took sick the latter part of September or the first of October. I do not remember now.

Q. Describe this symptoms—how he acted.

A. ——.

Q. State whether you were with the veterinarian surgeon when he examined the other cattle. And, if so, how many did you see him examine and whose animals?

A. There were two that I saw him open and examine. W. D. Johns was the owner of one, and I think the other was Lewellin Reese, but I am not positive.

Q. Did you notice those other animals when they were sick?

A. I did.

Q. State whether your steer that died had the same or different symptoms.

A. Yes, sir; the same.

Q. How did your steer get exposed?

A. My pasture was laying along the route, joining an 80 acres, where they stopped all night. Some of my steers broke out and got on this trail and on this eighty.

Cross-examined by DICKSON:

Q. You say your steer broke out and got on this trail and this 80. Did you see them there yourself?

A. I did not.

Redirect by BUCK:

Q. State whether or not at the time you were before the referees you had any other stock that were sick or had been sick.

A. Yes; I had two steers.

Q. State whether their symptoms were the same or different from the one that died.

A. They were the same, but did not seem to have the disease as violent as the others.

Q. If either of those two steers have since died, state when he died.

A. He died in January of last winter.

Q. Did he appear to die from the same or a different disease or the same disease?

A. He seemed to have the Texas fever.

Q. What was that steer worth?

A. The same as the other one. All three steers have been half fed.

Q. State how this sickness has affected the living steer—his pre-ent condition and flesh. And how much is he now worth less than he would have been had he not been sick?

A. Well, he had the disease worse than the other one did. He has no flesh on him now; he is nothing but bone and skin. He was worth about $50 or $60 then and is worth nothing now, and that he seemed to get over it for awhile, but is worse now.

J. R. MADDOX.

My name is J. W. Ketcham; I am 58 yrs. old; I live in Elmadaro township. I came there in the spring of '57. I live a mile and a

quarter south of the trail taken by the Hosier Bros. cattle in going to the Brogan ranch. I lost 47 head of cattle. My cattle died of the Texas fever. In addition to the 27 head allowed by the referee I lost 7 three and four yrs. old steers worth 36 dollars each, three two yrs. old steers worth 26 dollars each, four yearling steers worth 15 dollars each, and six good milk cows worth 20 dollars each. They first commenced to die about the 1st day of August. They were running out on the range where the Hosier cattle staid all night. They were ranging on section 17, 20, 12, where the Hosier Bros. cattle staid over night.

79 Q. State fully what experience you have had in observing cattle that died of Texas fever.

A. About the first that we would notice the milch cows would dry up with their milk and would see them standing around with their ears dropped down, and seemed to have a very high fever, and keep on growing worse until they died. This is all that I can explain of the disease. In 1860 I saw cattle in that section that were sick and died of Texas fever, and again in 1864 or '5 and my cattle that died last year had the same sickness and the same symptoms that those cattle had.

Q. How do you fix the value of $36 on your three and four years old steers?

A. I had them all sold at that to A. G. Shepard, whose affidavit is submitted.

Q. Were you well enough yourself to give full personal attention to your cattle or who did it for you?

A. J. W. Bolton and H. J. Emly looked after them.

J. W. KETCHAM.

My name is J. W. Bolton. I am 21 years of age. Last year I worked for J. W. Ketcham and knew the cattle that he speaks of.

Q. How many head of cattle did Ketcham lose in all?

A. 47 head.

Q. State whether you saw them while sick and after they died.

A. I saw all of them except the six that went to Hartford. There were 17 that Ketchom sold to Shepard, 7 of which that died.

Q. Did you see any sick animals that was examined by the veterinary surgeon?

A. I saw one that belonged to Geo. Elliott that the veterinary examined.

Q. State whether the symptoms and the sickness of these cattle of Ketcham's that died were the same as that one of Elliott's that died or different.

A. They were all the same, as far as I could see.

—. Was there when the Hosier Bros. cattle were driven through?

—. ——.

Q. You may state if you know whether many or few of the people along the trail lost many cattle at that time.

A. Very near all of them along that line.

Q. You heard Mr. Ketcham's testimony as to the value of this 20 head that he lost. State whether those values, as he states, were a

fair market price of the cattle that were selling in that country or above or below it.

A. I think they were cheap enough as he put them.

Q. Of these 47 head that Ketcham speaks of, state how early any of them began to die off and when the last ones died.

A. Along close to the 1st of August, as near as I remember, and died as close up to the last of December.

Q. State whether the sickness of the last ones and the symptoms manifested were the same os the first or different.

A. They were about the same, as near as I can remember.

Cross-examination by Mr. DICKSON:

Q. Do you say that 17 Ketcham sold to Shepard, 7 of which died? How do you know?

A. Shepard, O'Conner, and Brogan Perkins, they saw them and said that they died, and I saw the herd afterwards and saw that they were gone.

Q. Then it is a fact that all you know about that 7 head is what somebody else told you?

A. I saw where they were buried and the bunch that they come out from and knew that they were gone.

Q. How do you know that they were buried there?

A. The ground would not have been been dug up there for nothing.

80 Q. You do not know anything about what that ground was dug up for or what was buried there, except what some one else told you, do you?

A. Of course not.

Q. You say that very nearly all the people along that trail lost cattle. How do you know that?

A. Because I saw them sick and saw them after they died.

Q. How many people's cattle did you see sick or dead?

A. I did not keep account of that.

Q. But you said nearly all the people along that line. Did you see the herd of nearly all the people on that line between Hartford and the pasture?

A. I just saw them in that neighborhood.

Q. What do you mean by that neighborhood?

A. Where I live.

Q. How far?

A. About three or four miles along the trail.

Q. Give your best judgment as to the number of cattle that you saw sick with this same disease or that died from it from your own personal knowledge, leaving out entirely what you have heard.

A. I could not give the exact number; I must have seen probably fifty, besides Ketcham's.

J. W. BOLTON.

My name is J. K. Emily. I worked last year at J. W. Ketcham's, and have heard his evidence given just now to the notary and know the cattle that he speaks of, and that 47 of them died. I know they

were pasturing on section 17, and that the Hosier Bros. cattle were herded there one night. I was over the trail from there east to Hartford, about 7 miles. For the last three years I have been interested in stock, and say that I know the fair market value of stock in that section last year, and that the price that Mr. Ketcham put upon that 20 head was reasonable.

Q. How many of the sick cattle that were afflicted with the Texas fever did you see sick along that trail?

A. About one hundred.

Q. As far as you recall them, name the persons that had the sick cattle that you saw.

A. Ketcham, 47; Scoggins, 15; Stratton, 3; Cooper, 2; Alice Shinberger, 5; Elliott, 9; Geo. Elliott, 4; Bolton, 3, and Geo. Terrill, 5.

Q. What animal did you see the veterinarian examine that he pronounced died from Texas fever?

A. Geo. Elliott's.

Q. Were the symptoms of the Elliott animal the same that the others that you had described or different?

A. The same.

Q. How often, if at all, while they were sick did you go to examine and look after the 7 head which Ketcham had sold to Shepard and that died at Hartford?

A. As often as every other day. I saw them while sick and when buried.

H. J. EMILY.

E. T. WHITE deposes and says:

Q. Did you lose any cattle in the summer of 1892 of Texas fever?

A. Yes, sir.

Q. How many head did you have exposed and where were they when exposed?

A. 52 or 53 head on the Brogan ranch, in Chase county, Kansas, which the Brogans were pasturing for me.

Q. When were your cattle first put in the Brogan ranch?

A. I think about the last of May or the first of June. It was at least before any of the Hozier cattle were driven from Hartford.

Q. How many of your cattle died over there of Texas fever?

A. Sixteen.

Q. What were they?

A. New Mexico steers.

81 Q. State whether you- cattle were in the same pasture in Chase county with the Hosier Bros. cattle that were driven over from Hartford or in a different pasture.

A. They were in the same pasture.

Cross-examined by H. D. DICKSON:

Q. Where were your cattle on the Hosier ranch with reference to the Hosier Bros. cattle?

A. They were all together when I saw them.

E. T. WHITE.

My name is John Patch; I reside in Center township, Lyon county, Kansas; I had 75 head of cattle exposed to the Texas fever by pasturing on section 1 and 2, township 20, range 10, and over which pasture these Hosier Bros. cattle were driven; 41 head of my cattle died, being the same which were allowed by the referee. The first of these animals died on Sunday, the 17th day of July, 1892, and most all of them in July and August; a very few lingered along and one died as late as in September. The symptoms of all the cattle that died were the same and the same as those of my neighbors that died. Of those others who lost cattle by this Texas fever I now remember Chas. Haber, plaintiff; R. Funk, Jessie Stratton, Adam Bitler, Mrs. Westfall, Christian Kruger, John Schrader, Hannah Bowers, and others. The other 34 head of my cattle were taken sick with the same disease; had the same symptoms, and among them were ten steers. They got stunted in their growth; did not take on flesh, and the feed did not do them any good, and they are nothing as valuable as if they had not taken that disease. I sold 10 head to John Byer at 2.30 per hundred, but if it had not been for this disease and the reputation that it gave them and the effect upon the market, they would have brought $4.00 per hundred. They would have averaged 1,100 lbs. The loss on them was $132.00. On the 24 that I keep their sickness reduced their value at least ten dollars per head. Those animals of mine that died had lots of ticks on them, and there was tick on those that were sick.

Q. Explain the symptoms of those that died as well as the others.

A. The milk cows would dry up their milk and droop their heads; refuse to eat or drink, and lag behind the herd and stay by themselves.

Q. State how long you have dealt in cattle, and if you are familiar in the price *price*.

A. I have dealt in them for 14 years and am familiar with the price.

Cross-examined by C. B. GRAVES:

Q. Who of your neighbors did you observe the symptoms of?

A. All those that were in the same pasture as mine was.

Q. Did your cattle and the cattle belonging to the parties named in your examination-in-chief all run in the same enclosure during the time that they manifested symptoms of what you call Texas fever?

A. Yes; they were in no closure at all; they were in an open field.

Q. Did you see any cattle that belonged to Chas. Haber that were sick and died?

A. Yes, sir.

Q. And did you see them while they were sick?

A. Yes, sir.

Q. How often?

A. Every day. Nearly every day and sometimes two or three times a day.

Q. Did you have the same opportunity of seeing all the cattle that belonged to the rest as you did of Haber's?

A. Yes, sir.

82 Redirect by J. JAY BUCK:

Q. State in detail what you did, and did you have any number of hands to help you, and the time that you spent and what that time was worth, and the doctoring and caring for the 41 head that died and the other 34 head that were sick?

A. I cannot tell just how much that did come to. I lost $200.00 in the operation. I had three teams lying idle on account of it. I spent $7.00 in medicine in doctoring them. It was all well and reasonably worth $200.00.

JOHN PATCH.

Q. State your name, age, place of residence, and occupation.

A. J. P. Rossillen; I am 29 years old; I live on the N. half of the southwest quarter of section 19, 21, 11. My cattle were running within a mile of the trail of the Hosier Bros. cattle on an open range.

Q. Describe the symptoms of the four head of cattle that you lost and which were allowed by the commissioners.

A. The first that I noticed they would lay down away from the other cattle; they staggered around when I got them up, and their ears would droop, and was hardly able to walk. I noticed the other cattle that were sick with the Texas fever from Olpe to Shaw creek, ten miles, and my cattle that died had the same symptoms that those cattle had. The cattle that I have mentioned as having the same symptoms as mine had in part belonged to Soule, Langly, Starr, Kuhlman, Structchel, Morean, Conway, Littler Bros., Haber, Plaintiff, Bitler, Funks, Stratton, Hughes, G. P. Jones, John Middaugh, Vanvleve, Humphrey, McKey.

J. P. ROSSILLEN.

My name is Mary Conway. I live in Center township, and am the same Mary Conway to whom the commissioners allowed $84.00 for three cows and a heifer.

Q. State how your cattle that died acted after they were taken sick.

A. They acted stupid, and when they would walk along they would stumble. They acted just like the other cattle that died of Texas fever in that country, to wit, McCormick, Swager, Starr, Hawbecker, Kuhlman, Scroeder, Junker, Soule. My cattle were on the range over which the Hosier cattle passed.

MARY CONWAY.

My name is D. H. Guard. I reside in Elmeridaro township. I lost by Texas fever in the summer of 1892 3 cows and 1 steer, worth 12 dollars. My cattle were in pasture along the trail taken by the

Hosier Bros. cattle when driven from Hartford to the Brogan ranch. The first trip in May some of those Hosier cattle broke into my pasture, and some of them that were driven along there in June also broke into my pasture, and thus my cattle were exposed to the Texas fever and died from it. I noticed Texas cattle ticks on some of my cattle that died. My cattle went along with their heads down and their ears drooped forward, and they staggered and wobbled along as they went. I saw lots of other cattle that died from Texas fever, and their symptoms were the same as my cattle. Among those of my neighbors who lost cattle by that disease I now recall J. K. Stratton, Scoggins, W. T. Hyatt, L. Y. Cooper, Elliott, Baysingers, Ketcham, and quite a number in Hartford. These that I have named live in my immediate neighborhood.

D. H. GARD.

83 I am one of the members of the firm of Hughes Bros. I reside in Center township. Our firm lost three head of cattle by Texas fever. The commissioners allowed us for two head of fat steers 90.00 dollars. The other steer was nearly four years old, would weigh 1,350 lbs., was in good condition, and was well worth $42.00. Our cattle crossed the trail of the Hosier Bros. cattle, and before the quarantine; head hang down, ears drooped, staggered around, and would pass blood. I saw other animals that were sick with the Texas fever, and our steers were the same and had the same symptoms. I saw Jane Jones' cattle; they had the same disease.

J. G. HUGHES.

My name is H. C. Jackson. I reside in Madison, Kansas. I am 49 years of age. I am the same H. C. Jackson to whom the commissioners allowed $1,889—$25.00 for 41 cattle that died, and damage on 125 head of $625.00—and who presented to said commissioners for claim on 117 head of steers that took the Texas fever and were reduced in flesh and became unsalable as fat cattle, and I was compelled to keep them over and lost at least $12.00 per head on the same because of such disease. My cattle that took sick had the following symptoms: Their head drooped, they would stand by themselves, ears drooped down, and when — would walk would wobble around. Dr. Richards, the veterinarian, made *post mortem* examination on some and made examination on the sick ones and pronounced it Texas fever. Eighteen years ago I had experience with Texas fever and I know it was Texas fever. My pasture was adjoining the Brogan ranch, in Chase county, and some of the Hosier cattle got out of the Brogan ranch into my pasture and mixed with my cattle.

H. C. JACKSON.

I am the same John Langley who lost eight head of cattle last year and to whom the commissioners allowed $118.00. I know the trail over which the Hosier Bros. cattle were driven from Hartford to the Brogan ranch. My cattle were pasturing on and across that trail.

Q. State the symptoms manifested by your cattle that were sick of the disease.

A. The first that I noticed of them the ears commenced to droop down and finally commenced to stagger.

Q. Did you see other cattle along that trail that died of that disease?

A. Yes, sir; a hundred or more.

Q. Were the symptoms of the other cattle that you saw along that trail the same or different.

A. They were the same.

Cross-examined by H. D. DICKSON:

Q. Did you see the Hosier cattle when they were being driven through?

A. Yes, sir.

JOHN LANGLEY.

My name is J. W. Van Cleve. I reside on section 12, 21, 10. My father, J. C. Van Cleve, and myself owned 26 head of cattle together. I know the trail over which the Hosier Bros. cattle were driven from Hartford to the Brogan ranch. Between 1,300 and 1,500 head of the Hosier Bros. cattle about the *k*iddle of May, 1892, stayed all night on our land—16, 21, 10. Our cattle were pasturing on that 40 at the same time.

Q. How many head of your cattle took sick?

A. There were 16.

Q. How many of the 16 died?

A. 14.

Q. Do you know the fair market value of such cattle at that time?

A. I do not know that I do at that time.

Q. Who appraised them?

A. Grat. Rufferd and Alex. Mackey.

Q. Describe the 14 head that died.

84 A. Three-year-old brindle, with a white face steer, and a three-year-old steer, pale red.

Q. What were they worth?

A. They were worth $40.00.

Q. Describe the rest.

A. Two two-year-old steers, one worth $30.00 and the other 27.50, and seven cows—all milk cows except one, which would have been fresh in a few days.

Q. What were the cows worth?

A. From $25 to $30.00 apiece. One bull, short-horned Durham, 8 or 9 years old, worth about $75.00; weigh 2,000 lbs. One yearling heifer, worth $14.00, and one yearling steer, worth $18.00.

Q. Describe the symptoms these animals had that were sick.

A. They would stagger around with their ears drooped and cold, and stagger and fall. They had a tendency to get off by themselves.

Q. Did you notice other animals of your neighbors that took sick and died at that time?

A. Yes, sir.

Q. Name as far as you can the people along that route whose cattle died of that same disease.

A. Grant Rufferts's, Otto Briers', Griff Hughes', Griff Jones', Stratton's and Adams Briers', Chas. Haber, plaintiff; Widow Westfall, Patch, Creigler.

Q. State whether your cattle had the same symptons of these others that you have mentioned or different.

A. They were similar to the others.

Q. For how many years have you been accustomed to buying and selling cattle in that section of the country?

A. 12 or 14 years.

Cross-examined by H. D. DICKSON:

Q. In these two three-year-old steers what kind were they as to breed?

A. They were native cattle; short-horned Durhams.

Q. Do you mean they were full-blood Durham?

A. As near as they would get them around here.

JAMES W. VAN CLEVE.

My name is J. C. Van Cleve, who was mentioned by the last witness. I know the cattle to whom he referred. The values that he gave were correct. The symptoms were the same as he gave it, only they passed blood, and they drooled at the mouth. Otherwise I adopt all of his testimony as my own.

J. C. VAN CLEVE.

My name is John Stotler. I live in Pike township, Lyon county, Kansas. I lost two fat steers that the commissioners appraised at $104.00. C. W. Stotler lost one steer appraised at $52.00, and S. Stotler lost 4 cattle, 2 cows and 2 beef steers, which they appraised at $154.00. I knew where the Hosier cattle trail was, and all these cattle grazed over that trail, and were there when those cattle went through.

Q. Describe now the symptoms of those cattle while sick?

A. Their ears drooped and stand with their head down, and inclined to be with themselves; would stagger around.

JOHN STOTLER.

Ky name is Pat. McCormick. I live in Center township, Lyon county, Kansas. I lost one cow of Texas fever by running over the range over which the Hosier Bros. cattle passed. The cow was sick a few days and died. She was droopish, ears hanging down, stagger around, and would drool out of the mouth.

PAT. McCORMICK.

My name is W. H. Watkins, of Center township. I lost 4 cows and one calf by the Texas fever. They were running on the
85 range where the Hosier Bros. cattle trail was. They were appraiseed $108.00 and were well worth it. The first thing

that I noticed after the Hozier Bros. cattle went through—it was about the 17th of July I noticed something wrong. In a day or so I heard that there was cattle that was dead over on Coal creek and that the veterinarian surgeon had been there and pronounced it Texas fever. I went and examined my cattle. I found then that the cattle were not grazing right, several head of them. The first thing that I noticed was a drooping, languid appearance, with the ears drooping down, and they would not eat, and hardly able to walk, keep to get worse every day till they refused to eat entirely. On July 20th the first one died for me. She was a four-——old cow. The other cattle were affected by this time and were getting worse. I took the balance of the cows off the range, and the 25 of July three died, and then another fat cow dragged around until the 28th, when she died; all dying of the same symytoms, as far as I could see.

Q. How many other folk lost cattle of this same disease which cattle you saw while sick? Name them.

A. Freem Soules lost six cows; Michael Janker, I think he lost either 14 or 15. I am not positive. Mr. Hawbecker had 17 on the range and I think he lost *eight* 13 or 14. Mr. Langley lost several head; Mr. Olstrom several head; Mr. Kuhlman lost 12 head. I think it was Mrs. Starr lost several head; Joe Strutsel lost several head; Mat. Maurin lost several head, and James Bratt lost several head.

Q. State whether the symptons of these animals, the owners of whom you have just named, died the same as your cattle or different.

A. The symptoms of those several head of them I saw myself was identically the same, as far as I am able to distinguish them.

Q. If Dr. Richards, the veterinarian from Emporia, made an examination of any of the animals that you have referred to, state whose it was and what disease it was he pronounced it.

A. An animal of Joe Strutchel's was examined by him, and he pronounced it Texas fever.

W. H. WATKINS.

My name is Jane Jones; I live in Center township, Lyon county, Kansas. The Hosier Bros. cattle when driven through to the Brogan ranch stayed all night by my place. That is the way my cattle got the disease. I had 28 head in one bunch, and they all died of that disease. Some was so severe that they would hook any one that would go near them. The cows that were giving milk dried up and the cows that were with calves died right off. Dr. Richards, the veterinarian surgeon, was out there, and he called it Texas fever.

JANE JONES.

Q. State your name, age, occupation, and residence.

A. My name is D. G. Franks; I am 44 yrs. old; occupation, cattleman, and have been for many years, and reside in Del Rio, Valverde county, Texas, and formerly resided in Pecos county, Texas, and have known the section composing the two counties for ten years.

Q. I now exhibit to you a map published by Rand, McNally and Co. embracing the census of 1890 and ask you whether it is substantially correct as to Pecos, Crockett, and Valverde county and the Pecos river, as shown therein from the county of Crane to this town of Del Rio.

A. I think this map is substantially correct.

Q. Do you know the ranch formerly owned by the Inde-
86 pendence Cattle Company and sold by Thomas E. Tutt to Hosier Brothers?

A. I know the place. It is on the Independence creek and about six miles from the northwest corner of Valverde county. The ranch itself, that is the headquarters is about six miles from the Pecos river. I am familiar with the Pecos river from where it form- the south and west boundary of Crockett county until it empties into the Rio Grande between Shurnuler and Painted Case. The Southern Pacific railroad crosses the Pecos river between Viaduct and Schumler.

Q. How many bridges, if any, are there from the northwest corner of Crockett county to Flanders across the Pecos river—that is to say, the mouth of the Pecos river near Flanders?

A. None, except the railroad bridge on the Southern Pacific between Viaduct and Schumler.

Q. From the northwest corner of Crockett county to the mouth of Pecos river how many places over there where cattle could readily cross through and over Pecos river, and what is the average width of the water of the Pecos river for that distance?

A. At least 100 places where they can cross. They can cross almost anywhere until they get 10 miles below the N. W. corner of Valverde county; from that down much of the county is bluffy. Average width of water about 70 feet; some places not over 30 feet.

Q. Do the Texas cattle in Pecos and Valverde counties often cross and recross the Pecos river?

A. Yes; they often cross.

Q. Please give the area an population of Pecos c-unty?

A. The area of Pecos count is between 7 and 8 thousand square miles and the population between 11 and 15 hundred.

Q. Are there any fences or other boundaries or obstructions between Pecos county and the counties of Valverde and Crockett.

A. There are none.

Q. How often do the men in Valverde, Crockett, and Pecos counties round up their cattle as a rule?

A. Twice a year, spring and fall.

Q. State whether you inspected the Hosier Brothers cattle before they shipped them in May, 1892, to Kansas.

A. Yes; I inspected them at the Independence ranch. The Hosier Brothers ranch was down to Pecos river.

Q. Is it a common or uncommon thing for Pecos county cattle to cross the Pecos river over to Valverde county during the season?

A. It is a common thing.

Q. When did the Hosier Brothers commence their round up in April of 1892?

A. I don't personally know.

Q. Please write your name along with the clerk who takes these depositions on the margin of this map I have shown you, so as to identify the map.

A. I do.

Q. State whether you personally know of cattle crossing the Pecos river and how you know it.

A. I know of cattle crossing the Pecos river, having seen them cross, and in other instances have seen them on our side and then again on the other side of that river.

Q. What official position did you hold when you inspected these Hosier cattle?

A. I was deputy inspector of hides and animals of Pecos county.

Cross-examined by H. C. CARTER, att'y for Hosier Bros.:

Q. Where is the ranch and range of Hosier Bros. cattle?

A. In Pecos county.

Q. Is not the Pecos river a very natural obstruction to the
87 passage of cattle from Valverde to Pecos county?

A. In the lower part of Valverde county it is a great obstruction, but above that they can cross. I can't say that cattle cross to any great extent; it is sure a few now and then.

Q. Did you ever know of cattle from Crockett or Valverde counties carrying any contagious disease?

A. I never heard of it. No; I do not.

Q. You have stated, have you not, that you inspected the two herds of cattle shipped to Kansas in the spring of 1892?

A. I have.

Q. What was the condition of said cattle?

A. The cattle were in good health and average flesh. I saw no ticks on the cattle, and they showed no sign of any infected disease.

Redirect examination:

Q. Aside from examining the marks and brands of the animals to see that they belong to the shipper, had the deputy inspector any other duties?

A. None.

Q. Then, I understand that your inspection had no reference to whether the animals so inspected might or might not communicate the Texas fever; am I correct?

A. Yes.

Q. If these Hosier cattle which you inspected, when they got to Kansas so communicated the Texas fever that 1,500 head of our domestic cattle died therefrom, would you suppose they were capable of communicating that disease when they started or acquired this capability on the route, and if they so acquired it how do you think they acquired that capability?

A. I don't know anything about it.

Recross-examination:

Q. In the inspection of cattle for the purpose you have mentioned d-es not the inspector have a good opportunity to examine the general condition of the animal?

A. Yes.

D. G. FRANKS.

My name is Fred. Smart; age, 35; reside in Valverde county, Texas, and know the Hosier Brothers ranch in Pecos county and their cattle.

Q. State whether or not during this year you have seen the Hosier Brothers cattle, and describe where those cattle were ranging, and describe fully.

A. Most of the cattle I saw was in Independence creek, in Pecos county, and from the Independence down the Pecos river to Lantry some on both sides of the Pecos river.

Q. Please look at this map shown by J. J. Buck, who represents the plaintiff, and state if in your judgment it fairly shows the Pecos river and the lines of the Pecos and Valverde counties, and sign your name in the margin.

A. I think this map fairly represents it and I sign my name.

Cross-examined:

Q. Was it not only a few scattered and drifting cattle that you found in Valverde county at the time you stated?

A. Yes; only a few.

Q. In the spring of 1892 did you know anything about the Hosier cattle range?

A. I did not.

Redirect cross-examined:

Q. Starting from Independence creek and going down south along the river for 40 or 45 miles, state how many, if any, chances there are for cattle to cross that river.

88 A. At every bed in the river cattle can cross. I brought a herd of cattle that way.

FRED. SMART.

My name is H. H. Henry. I now reside in Emporia, Kansas. In May, 1892, I resided on my farm on Eagle creek, about six or seven miles from Hartford, Kansas. I know when the bunch of Texas cattle were shipped in here about May 1st, 1892, and I knew about the second shipment some time in June, 1892. I know the route taken by those cattle when driven from Hartford, Kansas, to Brogan's ranch, in Chase county, Kansas, so far as the route extends from Hartford to Olpe, Lyon county, Kansas, about 15 miles.

Q. Do you know of any of those Texas cattle being left out of the herd and not driven through at the time? If so, state all you do know about them.

A. Yes, sir; several left about three miles out here west, and also

on the field a few miles further on. Farther than that I don't know of any being left more than I have heard.

Q. If any of those Texas cattle got into and remained upon your premises, state the fact, and how long they so remained, and what eventually became of them.

A. Well, they was one out of the second herd that went through that was in Mr. Emeley's pasture, south of the pasture where I had rented; it next was seen in my pasture. I next saw it there; it was in there about four days, as near as I could find out. I drove it out and drove it north; think it was the same steer that came east and got into a hay-field I had out here and remained there, I think, perhaps a week or ten days. I notified Mr. Brogan about it, and some one went out there and shot it; don't know who it was. I supposed it to be the same steer, because others said it was and it looked to be the same.

Q. If any of your animals took sick with the Texas fever you may state how it affected them; how much, if at all, they were stunted and put back in their growth; what, if anything, you or your help did to care for or doctor them, and you may also state what damage, if any, you sustained because of the impairment in value of any of *any of* your other animals, their age, and kind, and what, if anything, you lost in the sale thereof, and tell how, if you know, they were exposed to this disease of Texas, splenic, or Spanish fever; state all very fully and in your own way.

A. The pasture I rented was a quarter of a mile north of the road that Texas cattle passed on. I drove my cattle across the road that the Texas cattle passed on some few days after they passed; don't remember just when and about. It was about the 12th or 13th of August I noticed one of my cows being sick that was in that pasture, and in a day or two there was another one or two. There was, they appeared to be very sick, gaunted up a great deal, and had a right smart of fever; stand with their heads down a good deal and ears drooped. I had seen a good many of these cattle that they claimed had the Texas fever, which had been decided on by veterinary surgeon, and I understood they acted the same as they did. I had book that recommended carbolic acid to use on them. I gave it to them internally diluted, and also washed them with it diluted. I continued that treatment for about ten days; they seemed to be getting better, and I did nothing further except to turn them in on some tame grass I had. They were considerably reduced in flesh and it took them a good while to get over the effects of the
89 fever. I fed them green corn from that on; continued feeding them corn until February, and then sold some. Those that had fever there was nine head of 2-years-old steers I had in that pasture. I got scared and supposed they were all going to die. I shipped them out to Kansas City, and I had to put them on the market as exposed cattle. I got a little over $11.00 a head for them; some cattle I paid $17.55⅞ the November before for. I had 20 head of the same bunch of steers that I took south that I paid the same price for that I sold in the fall afterwards for $25.00 per head. At

the time I crossed the trail with my cattle I had no knowledge of Texas fever.

Q. How much was your one heifer and two cows reduced in value by that sickness?

A. Perhaps the damage was $30.00.

Q. What was the fair value of your time and that of any of your help in doctoring those cattle and any extra feed you gave them?

A. I fed them grain about two months earlier than I otherwise would. The grain perhaps was worth $9, and perhaps for medicine and time I took to doctor them was worth $5.00.

Q. Was any of them milk cows?

A. 2 cows were milk cows and dried up because of this sickness.

Q. You may state about when they first took sick.

A. They took sick about August 12th. They were on the northeast of southeast section 15, township 20, range 12, Lyon county, Kans.

Cross-examination:

Q. You say you know the route taken by those cattle from Hartford as far as Olpe. How do you know it?

A. I saw them going on the road part of the way up past my place. The balance I know from what others told me.

Q. You say there was one steer out of the second herd that was in Mr. Emeley's pasture, and you think, from its appearance, the same steer was in your pasture?

A. No; I said the same steers got into my pasture. I drove it out, and it went into a hay-field.

Q. How do you know that steer was one *of* the Hosier Brothers had and were driving to the Brogan ranch?

A. It look- like it belonged to the others, from seeing others that did belong to them that were left along the route. I seen that same bunch of cattle in the corral when they were unloaded.

Redirect examination:

Q. State whether you discovered ticks on either of these bunches of cattle that were shipped in here and taken to the Brogan ranch.

A. Saw what looked to be ticks on the second bunch.

Q. Had you any doubt about *there* being ticks?

A. No, sir. I was right up to them, by the fence.

Q. Were—did they generally have ticks on them?

A. All that I noticed did.

Q. From here to Olpe how was it about cattle dying along the trail?

A. All I know is Mr. Stratton, Mr. Cooper, Mr. Scoggins, Dr. Welch, and others that I know of losing cattle, all of the same symptoms.

Q. Were there any other Texas cattle around here other than those shipped in?

A. Not that I know of.

H. H. HENRY.

V. G. BAYSINGER: I reside seven miles southwest of Hartford. I knew when the two shipments of Texas cattle came here to Hartford—one May 1st, 1892, and the other in June, 1892. I saw the first bunch when being driven from Hartford to the Brogan ranch, in Chase county. A steer from the first bunch and a cow from the last bunch got into my pasture; don't know how long he was there; drove him out twice.

Q. How long after the herd had been started for the Brogan ranch was it you drove this steer out the last time?

A. Can't say for certain, but think it was a week before they took the last bunch out, which would make it along in June.

Q. Take the cow you drove out which belonged to the last bunch, how long after last bunch had been driven, did you drive this cow out?

A. I think it was about the second or third day.

Q. Were this steer and cow Texas cattle?

A. Yes, sir.

Q. What became of this cow and steer, after you drove them out?

A. They run for about a month in the lane and around there, I think; one of them was finally killed. The cow was in Cooper's pasture part of the time and in Roger's pasture part of the time.

Q. Were there any other Texas cattle around here except those shipped in by Hosier Brothers?

A. None that I know of.

Q. Did you see them when they were being driven away from Hartford?

A. I did, the first bunch.

Q. Who were driving them?

A. B. F. Timmerman was one of the drivers.

Q. Aside from the steer you have mentioned, how many other animals strayed away from that herd in being driven—of the first bunch that you know of?

A. I don't know personally. I saw another that strayed, but I don't know from which bunch. I think Mr. Brogan killed the animal.

Q. How many animals, if any, did you have taken sick with the Texas fever?

A. I had six.

Q. All die?

A. Two of them.

Q. As to the other four that was sick, state about when your cattle first took sick, how much, if at all, they were injured or stunted in growth or depreciated in value?

A. They took six, the first one, about the middle of July. It was Texas fever. I would think $28 on the four would be small enough for the loss in value.

Cross-examination:

Q. Why do you say these four head which you claim were damaged had Texas fever?

A. The way it worked, and other people had doctors there, and they pronounced it that.

Q. You never had any experience with Texas or Spanish fever before this time, did you?

A. No; never paid any attention to it.

Q. How do you know this cow and this steer came from the Hosier herd?

A. Well, I know they were not there when the herd went along and were there afterwards. The steer was left in Mr. Emeley's pasture; the fence was down.

Q. You say the steer was first left in Mr. Emeley's pasture?

A. He was left in the road, and I suppose got in the next morning.

Q. What I want to find out is, do you know this yourself or did you hear it from some one else?

A. I could not say I saw him in the herd, for I was not near enough.

V. G. BAYSINGER.

H. H. HENRY recalled:

Q. If you saw any of those Texas cattle that were being driven in the first herd about the 1st of May that strayed away or were left from the herd as it passed along, state that fact, the number of such animals so straying out of the herd, and where they were for a ti-e after being so separated from the herd.

91 A. I counted in the evening, I think it was, 23 head on the prairie about three miles west of Hartford, in the evening after the first herd passed along, I think it was. They remained on the prairie and around there for ten days or two weeks, as near as I can remember.

Cross-examination:

Q. How do you know the cattle you speak of came from the Hosier herd?

A. I was in town and went out after the herd went by. There was cattle on the prairie that I counted, twenty-three head, and I was talking with Mr. Mouser about the cattle, and they appeared to be of the same herd that I saw them starting down.

H. H. HENRY.

J. L. STRATTON: I live six miles and a half southwest of Hartford, Kansas.

Q. Did you know of Texas cattle being unloaded here about the 1st of May and again about the middle of June last and being driven over to Brogans' ranch, in Chase county?

A. I knew they came in; yes.

Q. Did you have any animals take sick soon after that?

A. I had three take sick about the 12th or 13th of August. They died. I buried one of them.

Q. Did you see other cattle sick about that time around here?

A. Yes.

Q. Name different people who had sick cattle that you saw along the line of the trail.

A. I seen Cooper's, I see Scroggins', one of the V. G. Baysinger's, W. A. Pease, one of George Welch's.

Q. State whether these several sick animals along this route had the same sort of symptoms, or was their sickness different?

A. All acted about the same, so far as I know.

Q. If you shipped any animals because of this sickness and sold them and they brought less than they would have brought if it had not been for the known disease prevalent in your part, state the number, where you sold them, when you sold them, what they brought, and what they would have brought if it had not been that the patrons of the cattle market knew of such sickness.

A. I and my father shipped 76 head from the pasture where the sick ones died. Verner and Scroggins, of Kansas City, sold them. I told them the situation; I told them that I had lost some cattle; that I had left some sick ones at home; my father had lost one. They told me. They brought $2.75. They would all have brought $3.25 except about ten head. In my judgment those ten head would probably have brought about three cents.

Cross-examination:

Q. You said you knew of the Texas cattle being landed at Hartford and driven to the Brogan ranch. Do you know anything about that except what you have been told by others?

A. No.

Redirect examination:

Q. State whether or not it was generally reported that these heads of Texas cattle were driven from Hartford to the Brogan ranch in Chase county.

A. Yes.

Q. Is there anything within your knowledge that leads you to believe that such herds were so driven?

A. Yes; I seen the tracks and I heard. All I seen was tracks and one steer.

Recross-examination:

Q. Do you, of your own knowledge, know anything ab-ut where that steer came from?

92 A. No, sir; not of my own knowledge.

Redirect examination:

Q. State if you saw on any of the cattle that you saw sick any ticks.

A. Yes, sir; one on H. R. Scroggins'.

J. L. STRATTON.

W. A. PEASE:

Q. Did you, along about the 1st of May, 1892, see a herd of Texas cattle being driven west from Hartford?

A. Yes, sir; I saw the herd in Brogans' pasture, near Hartford, and saw them being driven over the line west towards Brogans' pasture, in Chase county?

Q. State if Mr. Joseph Brogan was with this herd of cattle.

A. Yes, sir; he was.

Q. After the herd passed did you see any stragglers?

A. There was about twenty head left there, and they staid there nearly all summer.

Q. How many of your cattle did you bury?

A. Four.

Q. Why do you think that these twenty head of strays were a part of this bunch that was being driven by Joseph Brogan?

A. Because they were the same brand and were Texas cattle.

Q. Did you notice any of these Texas cattle, either in the herd or of this bunch of strays, close enough to be able to tell whether or not they had ticks on?

A. Did not notice them.

Q. Were there any native cattle in your neighborhood that died from the first of July on? If so, state who lost them and how many each person lost.

A. There were lots of them in the neighborhood. Scrogging lost 52 head; I lost 4 head; Mr. Hock lost about 20; George Welch lost three; Tom Welch lost 2 or 3; Strat-on lost some; Mrs. Jones lost some, and many others.

Q. Did you see any of the sick?

A. Yes; lots of them.

Q. State if these various cattles that died that you saw sick appeared to be afflicted in the same manner.

A. Yes; all in the same manner.

Q. Did you see ticks on them?

A. Yes; lots of them.

W. A. PEASE.

JOHN HOCH: I live about four miles southwest of Hartford and near the line along which the Hosier Bros. cattle were driven over to Brogans' pasture, in Chase county. I saw the first bunch that was unloaded at Hartford on a piece of land belonging to Mr. Brogan, near Hartford, before they were driven to Chase county. They were what are generally know- as Texas cattle.

Q. Do you know about the time when this herd was driven from Hartford to Brogans' ranch, in Chase county?

A. I think so; can't tell the exact time.

Q. After they had been driven did you see any stragglers roaming around of the same character and appearance of the cattle that you saw on Brogans' place, near Hartford?

A. Yes, sir; I seen them on the range a mile west of Brogans' pasture at different places; some of them had gotten away over south.

Q. About how many altogether?

A. About six or eight head; maybe more; some of them got scattered out.

Q. What makes you think these stragglers were of this Brogan bunch?

A. Because they looked like them. They were thin, poor Texas cattle. There was no other Texas cattle in the neighborhood.

93 Q. About how many cattle around in the country died after the first of July and on through towards the fall within the range of your knowledge?

A. Well, considerable over a hundred head that I know of right in my neighborhood.

Q. Did you see any considerable number of these while they were sick? If so, state if they were affected in the same manner.

A. Yes, sir; I saw a few besides my own. I lost 20. My son lost 4, and they were affected just the same as mine. All that I saw was affected just alike.

Q. Did you notice any ticks on the living or dead native cattle after this herd of Texas cattle had passed along?

A. Yes, sir; lots of them.

Q. Had you ever noticed any prior to that time?

A. No, sir; never saw ticks of this kind before in my life.

Q. Did the cattle generally to a greater or less extent sicken and die along the line over which these bunches of Texas cattle were driven?

A. Yes, sir.

Q. Was the disease with which they were affected the same?

A. Yes.

Q. How many of the cattle that you lost did you bury?

A. I buried 19 head; have received no pay therefor from any one.

Q. Were the animals which your son, J. W. Hock, lost, namely, 4 animals, buried?

A. Yes; and no paid for the burying.

JOHN HOCH.

G. E. WELCH says: I reside four miles southwest from Hartford, Kansas. I knew about the time of the shipments of the Hosier Brothers cattle into this county about a year ago. I knew about the time they were driven to the Brogan ranch, in Chase county. Just after the first herd was driven away to Chase county I saw on the range near me about twenty head of those Texas cattle that had some way got out of the herd. They remained around in the neighborhood something like a week or ten days. I lost three head of cattle with the Texas fever. I saw a number of cattle of other parties that were sick with the same disease. It was a very common thing to find cattle sick and dying along the route where the Texas cattle were driven on their way to Chase county. The animals that I had die of Texas fever had lots of ticks on them. I had other animals that were sick and they had ticks on them. I treated them with a good deal of care; rubbed the ticks off and put carbolic

acid on the animals and thus saved them. I had one milk cow that was sick with this Texas fever. She dried up so she was worth nothing as a milk cow; 4 head of my cattle had these ticks on them, which I took off and used carbolic acid as a preventive. The doctoring of those four and the cow that dried up was well worth $7.00 or $8.00. The damage to that cow and the loss of the milk was well and reasonably worth $25.00. I saw several parties who had these sick animals that had ticks on them and among them T. E. Welch, W. A. Pease, and H. R. Scoggins.

G. E. WELCH.

A. G. SHEPARD: I live in the city of Hartford. I saw both bunches of the cattle that were unloaded here in May and June and taken to the Brogan ranch, as mentioned by other witnesses. Allen Holt and myself stood and counted them off as they were unloaded for the Messrs. Brogans to see the number of the last shipment.

Q. State whether you noticed ticks on those Texas cattle that were unloaded here about the middle of June and which you say you helped count off.

A. Why, I could not say which bunch. I saw ticks and saw both bunches; could not say on which were the ticks.

Q. State whether any of those animals after being counted off—after being unloaded—remained about town and did not go to the Brogan ranch. Explain.

A. There was one cow that staid around town here for several days and would get with town cows when the coys would
94 bring them in at nights. There was one not able to go out, and they finally shot her on the town site.

Q. Did you have a pasture in which town cows were kept?

A. I did.

Q. About how many town cows were pastured in your field?

A. About thirty-six head.

Q. How many of those 36 head died of Texas fever?

A. I don't know as I could be positive about the number. As I now recall it, there were 13 head that died.

Q. On those animals that were sick and those that died what do you say about there having ticks on them?

A. All that I noticed had ticks on them.

Q. If you had any of your own, state how many, how many were sick, how many died, and state the presence of ticks on them.

A. I had two. One died and the other was sick. Both had ticks on them.

Q. State whether your cow that was sick and did not die was a milk cow or not and how her sickness affected her.

A. She was a milk cow. Her milk dried up. I picked a good many ticks off of her and gave her carbolic acid and put some on her.

Q. What, if anything, was she worth less, sickened and dried up as she was, then than she would have been if remaining well and continuing to give milk?

A. What was the cow worth before she was taken sick and what was she worth after she was sick?

Cross-examination:

Q. You say that you saw both bunches of cattle that were unloaded in Hartford in May and June and taken to the Brogan ranch. How do you know the bunches of cattle that you saw and have testified concerning were taken to the Brogan ranch?

A. I don't know that they were taken there.

Redirect examination:

Q. Besides these two bunches you have spoken of were there any other Texas cattle shipped to Hartford in May and June, 1892, in which the Brogans were interested?

A. None that I know of.

Q. What were your means of knowledge of large bunches of cattle shipped to Hartford at that time?

A. I was here almost all the time, and think I would have known if any large bunches were shipped.

Q. Did you notice the different brands with which these Texas cattle which you say you counted were marked? If so, state, if you can, the kinds and number.

A. They had a number of different brands, but I could not say what kind of brands they were.

Q. How many different kinds of brands did you say there were on those cattle?

A. I could not say.

Q. How many different kinds of brands, taken altogether, around the two herds of cattle? If you cannot tell exactly, state whether they were many or few, and give your best judgment and recollection as to the number.

A. Cannot give any intelligent idea as to how many brands.

Q. State whether there were many or few, then.

A. I think there were as many as five; there might be more.

Recross-examination:

Q. Can you give any of those brands, and, if so, how many?

A. I cannot.

Q. Are you sure that you noticed on those cattle as many as five different brands?

95 A. I think there was probably five different brands in the bunch; would not be sure about it.

A. G. SHEPHERD.

A. A. WILSON: I live just at the edge of Hartford.

Q. Did you see the large bunch of about 1,500 Texas cattle unloaded here at Hartford about May 1st and 2nd, 1892, and driven to Brogans' ranch, in Chase county, Kansas?

A. I saw them; I saw part of them.

Q. Did you have any animals that took sick with the Texas fever? If so, state how many and how many died.

A. I had two that were taken sick and one died, both cows.

Q. State whether those two cows or one of them had a lot of ticks on them.

A. Quite a number of ticks on both of them.

Q. About when did they take sick?

A. Some time the middle of August; don't know just when.

A. A. WILSON.

D. B. STIGNER: I live in the city of Hartford and saw the two bunches of cattle unloaded here about May 1st and the middle of June last year, and saw them when they started to drive them away.

Q. Did any of those Texas cattle fall out by the way or remain?

A. Yes, sir; there was one stopped just across the street from my place and remained there until the next morning, and there was another one stopped right at the corner of the lot I was living on and remained there until about eight o'clock in the evening, and we got it started and it went to the west of the lot and the south side of the street and died there that night.

Q. State whether it had ticks on it.

A. That I could not state.

Q. If you had any animal that took sick, state what disease it died of and whether it was covered with these ticks.

A. I had one cow and it took sick with what they called the Texas fever and died with it, and it had ticks, and I noticed the ticks about two weeks before it died; picked them off every morning, as many as I could find.

Q. Had any animals that had taken sick and died around here previous to that time ticks on them?

A. No; never saw any.

Cross-examination:

Q. Before these Texas cattle were driven here did you ever notice any dead cattle that had died of disease to see whether they had ticks on or not?

A. Yes, sir; I did.

Q. What dead cattle and where did you examine that you examined to see whether they had ticks on them?

A. I did not just examine them to see whether they had ticks on or not, but I made an examination of four that died in my pasture four or five years ago that they claimed died of hydrophobia.

D. B. STIGNER.

FELIX THOMPSON: I reside in Hartford, Kansas, and did in the year 1892. I knew when the two bunches came in here from the Hosier Brothers in May and June, 1892.

Q. You may now state if you assisted in driving those cattle from this place to Brogans' ranch in Chase county, Kansas.

A. I did.

Q. About how long did it take you to drive them from this place to the ranch in Chase county?

96 A. Two and a half days for each bunch.

Q. Take the first bunch delivered here in May 1st and 2nd, 1892, and state how many of the cattle dropped out by the way and were cut out of the herd and were not driven all the way through, and tell us in what places they were dropped off and left.

A. Could not tell just the number. The first piece of prairie was open out here that belongs to Mr. Buecher at the time, and I think we left 6 or 7 there the first time.

Q. Did you ever get them?

A. Yes, sir.

Q. State when and how you got them.

A. Part of them were taken out with the next bunch.

Q. In June following?

A. I think we came back and got them sooner than June. I worked for Francis Brogan and Joseph N. Brogan. I worked handling these cattle of the first bunch from May 1st until May 13th. When we came back from the Brogan ranch we picked up all the stragglers we could find and took them. When I went over in May Joseph N. Brogan, Bruce Hunt, Oliver Rayl, Ben. Timmerman, John Hammond, and Will. Campbell were along helping to drive the cattle, and we went to the Brogan ranch in Chase county with the cattle.

Q. Do you know how many of the cattle that you started with from the cars dropped out by the way?

A. I do not know the exact number; about 25.

Q. How many of those Texas cattle died on the way to the Brogan ranch?

A. Some were dead in the cars when they came, and I think about fifteen died.

Q. In the driving of those cattle from Hartford to the Brogan ranch what ones of the Brogans were along with them?

A. Francis Brogan and Joseph N. Brogan.

Q. You may state whether or not you discovered ticks on these Texas cattle the Brogans were driving with you to the Brogan ranch.

A. To the best of my knowledge, there was ticks of those that we skinned; those that died a mile west of town.

Q. Who besides Francis Brogan and Joseph Brogan and yourself were along driving those fifteen hundred in May?

A. I remember no one else going all the way through with us.

Q. Who paid you for the work you did in driving those cattle?

A. Francis Brogan, I believe.

Q. If you know who paid the other parties who drove the cattle, name the persons or persons so paying.

A. Some of the boys were with me at the time Mr. Brogan paid me, and he also paid them.

Cross-examination:

Q. In your examination-in-chief you stated that when you drove the first bunch of cattle to the Brogan ranch you left 6 or 7 on a

piece of open prairie that belonged to Mr. Bucher. Was this out of the cattle that were shipped in or was it a bunch you drove over in April?

A. Cattle that were shipped in.

Q. You say that you afterwards gathered them up. When was that?

A. I could no- state as to the time, but it was soon after the first bunch was taken out.

Q. How many bunches that were shipped in did you help drive?

A. I could not say whether more than one or not.

FELIX THOMPSON.

BRUCE HUNT: I reside in Hartford, and did during the year 1892.

Q. Did you assist in driving the two bunches of Texas cattle shipped to Hartford in about the 1st of May and about the middle of June and take- charge of by Brogans?

A. Yes, sir.

Q. To what point were those cattle driven from Hartford?

A. Drove to Brogans' ranch, in Chase county.

Q. Who employed and who paid you for these services?

97 A. I do not remember who did employ me. I think, though, it was W. J. Brogan; Francis Brogan paid me.

Q. Were either or both of the Brogans along with you while you were engaged in driving these two herds?

A. Yes, sir.

Q. Which ones?

A. Joseph and Francis both.

Q. Who appeared to have charge of these cattle on these trips, and gave directions thereto?

A. Joseph Brogan.

Q. In driving, say, the first bunch, were any of the cattle permitted to or did they stray from the bunch; and, if so, about how many and at what points along the route?

A. Do not know of any straying. Several of them were dropped at different points; about 12 or 15 out of the first bunch.

Q. Did this same thing happen as to the second bunch? If so, state how many out of the second bunch.

A. About 22 or 23 out of the second ubunch.

Q. Did you remain at the ranch during any part of the time from the time that you drove the first bunch until your drove the second bunch?

A. Yes, sir.

Q. Was Mr. Francis Brogan over there during this time?

A. Yes, sir.

Q. Did the second bunch arrive at Hartford as soon as they were expected to by Mr. Brogan?

A. No, sir.

Q. State if you ever heard from Mr. Brogan any reason for the delay.

A. Yes, sir.

Q. State what reason it was that he alleged.

A. He spoke something about their being quarantined.

Q. State if you noticed any ticks on the cattle of either or both bu-ches; and, if so, to what extent.

A. I see ticks on both bunches to quite an extent.

Q. State if you noticed brands on these cattle; and, if so, the number of different kinds of brands, as near as you can tell.

A. There must have been as many as twenty different brands.

Q. As far as you can remember, give a description of these different brands.

A. Cannot do this, except as to two or three of them from memory.

Cross-examination:

Q. How many drives did you make from Hartford of these Texas cattle that were shipped in?

A. I made three drive- that were shipped in.

Q. How far apart were they as to time?

A. The first two were close to a month apart or three weeks. The last one was a small bunch, and came from Caney, Montgomery county, Kansas.

BRUCE HUNT.

S. P. REASER: I reside in Hartford, Kansas, and am a practicing physician. I personally know of the shipment of the Texas cattle May 1st and 2nd and the middle of June, 1892.

Q. If you had any cow taken sick from Texas fever, state when it was and whether the animal lived or died.

A. I had one cow taken sick on the 3rd, I think, of August, and died in two days afterwards.

Q. State whether she had ticks on her or not.

A. She did.

Q. State whether you saw any of your neighbor's cattle that took sick, and whether the symptoms were the same as yours.

A. I saw W. H. Flickinger's and D. B. Stigner's, and they had the same symptoms as mine.

Cross-examination:

98 Q. In a case of the two you have mentioned did you observe whether those animals had ticks on or not?

A. One of them did; I am not sure about the other one.

S. P. REASER.

O. P. RAYL: I reside in Hartford and did during the year 1892. I saw the first bunch of cattle unloaded and assisted in unloading the said bunch of cattle, shipped to Brogans' over the M., K. and T. R. R. on the 1st day of May, 1892, and assisted in driving this bunch from Hartford to the Brogan ranch, in Chase county.

Q. Who was in charge of this bunch of cattle as you drove them across the country?

A. Joe Brogan.

Q. After you got this bunch of cattle to the Brogan ranch, in Chase county, what did you do then?

A. I remained there and looked after the fence to see that it was kept up for three months and — half until the 9th day of August.

Q. How man-, if any, during the first day's drive from Hartford dropped out of the herd and were left along the road?

A. About twenty-five.

—. Did you become familiar with the brands with which these cattle were marked so that you know the number and kinds of such brands, this as to both bunches, that were driven over there from Hartford?

A. I knew all the brands; about twenty-five different brands. I can give a description of eighteen of these different brands, but besides these there were others that I cannot give a description of. I hand to the notary a sheet with these eighteen different brands upon and which are numbered from one to eighteen, Exhibit "A."

Q. Were these cattle all of the kind commonly known as Texas cattle?

A. I think they were.

Cross-examination:

Q. Among the cattle taken to the Brogan ranch was one lot of 117 head that you understood were shipped here from Caney, Montgomery county, here?

A. No, sir; they were brought from near Coffeyville, Kansas.

Q. Were the brands on these cattle the same as the brands on the cattle shipped here from Texas?

A. No, sir.

Q. In the list of brands you have given do you include brands that were on these cattle shipped from near Coffeyville?

A. No, sir.

Q. While you were on Brogans' ranch helping about these cattle were there a lot of cattle driven there from Madison that you know of?

A. Yes, sir; but I do not know the exact number. I helped drive both bunches.

Q. Is it not a fact that on some of these cattle there were several brands on the same animal?

A. There was from one to three or four brands on some of the cattle.

Q. Is there any one of these brands that was on all the cattle? And, if so, state which brand on the list you have given the notary.

A. Number five was the one we went by; that brand was on all the cattle as far as I know.

O. P. RAYL.

S. E. G. HOLT: I reside in Hartford and did reside there in the spring and summer of 1892.

Q. How long have you resided in Kansas?

A. Since the year 1854.

Q. What experience, if any, have you had with the disease among cattle commonly known as Texas splenic or Spanish fever?

99 A. My first experience was in 1853, in southwest Missouri, and the next in 1857, in Kansas, and have had more or less experience from that time on.

Q. During this time to what extent have you seen Texas cattle that have imparted this disease to the natives?

A. Five times I have had personal experience and other times have seen others.

Q. Did you see the two bunches of cattle brought to Hartford by the Hosier Brothers over the M., K. and T. R. R. and taken in charge by Mr. Brogan and driven to his ranch, in Chase county, in 1892, or either of them; and, if so, which one?

A. Saw the first bunch; it was some time the first of May, 1892.

Q. State if you, at the time you saw those cattle, formed an opinion or judgment from your experience with Texas cattle and their characteristics and liability to communicate as to whether or not those cattle were liable to communicate the disease named to the domestic cattle of this section of the country; and, if you did form such an opinion or judgment, state what that was.

A. I formed such an opinion, and that opinion was, I told the bystanders when I saw them unloaded that they had better take the rifle and compel the engineer to turn his engine around and take them back, because they would kill every hoof of native cattle that pastured after them; because my opinion was that they would impart to our native cattle the Texas fever.

Cross-examination:

Q. Why did you think the bunch of cattle you allude to were liable to communicate Texas fever to native cattle?

A. Because my long experience for over twenty-five years and never saw it but where the domestic cattle died from it.

Q. Your reason, then, was, and you believe these cattle would communicate Texas or Spanish fever, because you had never seen Texas cattle driven over a range from April till fall but what they communicated the disease?

A. Yes.

Q. Was there anything in the appearance of these cattle which would lead you to think they would communicate the disease different from any Texas cattle coming in from Texas and being driven over a range at that time?

A. Nothing, any more than any other Texas cattle.

Redirect examination:

Q. In addition to the appearance, — not the fact of the place from which they were brought, to wit, the southern part of Texas, enter into your opinion or judgment as to their dangerous character, they being brought in at the season of the year in which they were?

A. My experience has been that those from the extreme south were more dangerous about giving the disease than those from the northern part.

S. E. G. HOLT.

G. T. COLLINS: I reside in Hartford, Kansas; my age is 61 years. I have lived in Lyon county over four years and in the State of Kansas since 1857. I saw both bunches of cattle referred to unloaded here at Hartford, the big bunch about the 1st of May and the other about the middle of June. I saw them start with the second bunch to drive them to Chase county.

Q. You may state whether you have ever been interested in and had control of and management of any Texas cattle; if so, you may state where you had such cattle and about when it was.

100 *Q.* My brother and I had 1,000 head of Texas cattle we brought the spring of 1860, we got into Leavenworth county, Kansas; about the 1st of June of that year we grazed them in Leavenworth, Atchison, Doniphan, and Brown counties, until some time in September, when we shipped them to Chicago.

Q. You may now state whether or not any of the domestic cattle around about and along with your Texas cattle took the Texas splenic or Spanish fever?

A. There was a number of cattle died from that disease; it was then called and was generally conceded to be Texas fever.

Q. Were there any other herds of Texas cattle in or driven through that immediate neighborhood that could have imparted the disease you have spoken of?

A. None to my knowledge north of Leavenworth county; the most of the cattle that died around ours was in Doniphan county.

Q. You may state whether you were obliged to pay for any of those that died.

A. We paid for a number of cows and other cattle; don't remember the number now.

Q. State whether you had any animals here at Hartford exposed to that disease from either of these two bunches spoken of.

A. I had one cow and she died.

Q. Did you see other animals of your neighbors around here that died about that time, either while sick or after they were dead?

A. I saw several that were sick, but none after they were dead that I remember of.

Q. State whether your cow that died here had the same disease of the native cattle that you spoke of dying in Doniphan county, or was it different?

A. The symptoms were very much the same.

Q. How were the others of your neighbors here that you saw sick?

A. Would take it to be the same disease.

Cross-examination:

Q. Did the cattle you spoke of having in the north part of the State have ticks on them?

A. Could not say; I did not examine them and could not say.

G. T. COLLINS.

W. J. SPENCER: I live right by the city; am 56 years of age. I saw in all three trains loads unloaded bring the same cattle mentioned by other witnesses.

Q. You may now state whether you saw ticks on those Texas cattle.

A. Yes, sir; I saw ticks on some of them.

Q. You may state whether you just happened to see them or whe*whe*ther you were especially looking for them.

A. No, sir; did not think about them until my attention was called to them.

Q. Give your best recollection whether you saw these ticks on some of the animals unloaded that you saw or the second or the third, or did it pertain to all of the trains; what is your best recollection?

A. I suppose the first train was about half unloaded when some little boys called my attention to them, and I saw them on all after that.

Q. You may state what the fact was after these Texas cattle were here and the domestic cattle were getting sick and dying with what was called Texas, splenic, or Spanish fever as to seeing ticks on the domestic animals which were sick and had died.

101 A. I saw ticks on some of the sick animals, and I saw one that had ticks on that was not sick, and I saw some sick ones that had no ticks on. I mean Mr. Flickinger's cow. She was sick, but I did not notice any ticks on her. She may have had, but I did not see them.

Cross-examination:

Q. About how many animals did you see with ticks on them that were not sick at the time and, so far as you know, never were sick?

A. Possible I saw some four, six, or five that were never sick at all.

W. J. SPENCER.

JOSEPH N. BROGAN: I reside in Hartford, and am the son of Frances Brogan, and the Joseph Brogan of whom some of the witnesses have spoken before.

Q. Did you accompany both of the bunches of cattle that came from Midland, Texas, from Hartford to your father's ranch, in Chase county?

A. I did.

Q. Were you familiar with the cattle composing those bunches?

A. I became familiar with them during the summer.

Q. You may give the line of travel over which you took these bunches of cattle from Hartford to the ranch in Chase county.

A. From the southwest corner of Hartford town*sight* we went west on a direct line to the northwest corner of sec. 23, township 20, range 11; thence south to the southwest corner of 34, same township and range; thence west to the northeast corner of same township and range, angling southwest across sections 6 and 1, adjoining

to the northeast corner of 11, 20, 10; thence west two miles; thence south one mile; thence west with the 1st herd one mile; thence south two miles; thence west two miles; thence in Chase county, angling southwest about four miles, to the pasture. The second herd took the same route, except from the southeast corner of section 9, 1, 21, 10, we kept south two miles, and from thence west to *the* Chase county.

Q. How long were you on the route?

A. With the first bunch it took us two days and a half; with the second bunch, two days.

Q. Please to give location of the place you stopped over night and stopped to graze.

A. With the first bunch we stopped to graze, I think, on the southeast quarter of section 15, 20, 12, and also with the second; staid all night with the first bunch on the southeast quarter of 12, 20, 11. We grazed both bunches of 33, 20, 11, and also on northeast quarter of 6, 21, 11. We staid all night with the first bunch on the southwest quarter of 16, 21, 11, and the second night with the second bunch on the southeast quarter of 21, 21, 10.

Q. Were you compelled to drop out of either or both of these bunches any stragglers? And, if so, state about the numbers.

A. Out of the first bunch we dropped along the road, I think, about 35 head at different points. Out of the second bunch we dropped only six.

Q. Did you receive from the Hoiser Brothers a description of the brands which appeared upon these two bunches of cattle?

A. I did.

Q. Does the sheet marked Exhibit "B" indicate those brands?

A. It does.

Q. With which one of the brands indicated by the number were the greater number of the cattle branded?

A. The brands number 1 and 2 were about equal in number.

102 Q. About how many were there that were branded with brand number 3.

A. I think about 20 head.

Q. Did these have either of brands number 1 or 2 on them?

A. They did not.

Q. How many head were branded with brand number 4?

A. I saw only about four head. There may have been more.

Q. Did those having brand number four have any of the first three brands on them?

A. I think one or two that was branded with number 4 had also brand number 2; won't be positive about this.

Q. How many had brand number 5 on them?

A. One was all I saw.

Q. Did that one have any other brand besides number 5?

A. It had several brands, none of which were the ones Hosiers had given us.

Q. How many were there having brand number six on them?

A. I notices two cows. There may have been more.

Q. How many were there bearing brand number 7?

A. One; branded also with number 2.
Q. How many bore brand number 8?
A. One was all I noticed.
Q. Did this have in addition thereto any other brand which Hosiers gave you?
A. No.
Q. How many bore brand number 9?
A. Probably a dozen. They were not counter-branded with any other brand.
Q. How many bore brand number 10?
A. One, which was not counter-branded—that is, had no other brand.
Q. How many with brand number 11?
A. One. No other brands on it, as I remember.
Q. How many bore brand number 12?
A. One was all I saw, and it was without counter-brand.
Q. How many bore brand number 14?
A. One steer. This had no counter-brand.
Q. How about 15?
A. Four or five cows, having no other brand.
Q. How about number 16?
A. One steer without any other brand.
Q. How many bearing brand number 17?
A. One heifer, with canceled brand, but none of Hosier brands.
Q. How many with number 18?
A. 300 or 400, but they were all counter-branded with brand number 2.
Q. State if, after the fore part of July, you passed frequently back and forth between Hartford and the Brogan ranch, in Chase county, over the line of travel taken by these two herds of cattle. If so, state how many times and what, if anything, you observed about numbers of native cattle sickening and dying along such route.
A. I passed about four times on part of trail, and on 17th of July went along the whole trail. That was when they commenced dying. I saw numbers of native cattle sick and dead, but didn't examine them. They were on the open prairies where we stopped and two pastures. I also knew of 206 head of Farrington & Lantry cattle dying in Chase county. The symptoms of the sick cattle were about the same. I also knew of about 100 head of what is known as the Montgomery cattle dying in Chase county with about same symptoms. In addition to these, I heard that there were large numbers of cattle that died along this trail during that summer and fall.

JOSEPH N. BROGAN.

103 GEORGE TERRELL: I live seven miles west of Hartford; am 37 years of age; my cattle were on the range where the Texas cattle were driven through.
Q. If you had any taken sick with Texas fever, state about when they began to take sick.
A. Along the first of August some time.

Q. If you had any die, state the number, and if you had any taken sick that did not die, state the number.

A. I had 11 die and 4 others that were sick.

Q. What care, if any, did you take of those four that were sick but live?

A. Well, we moved them on section right close there, and from there I moved on the Snediker ranch and herded them there. I gave them some medicine, but don't know what it was, but was some that was recommended.

Q. Describe the 4 animals that lived.

A. There were 2 milk cows, 2 yearling heifers. The two cows were what you might call fresh cows, 5 or 6 years old; one went entirely dry, the other gave a little milk along.

Q. What kind of yearling heifers were they as to size and quality?

A. They would weigh 600 lbs.

Q. Are you acquainted with the market value of such animals, of those 2 cows or those 2 yearlings heifers?

A. I ought to be.

Q. What were they worth at the time they took sick?

A. I should judge the two milk cows were worth $30 apiece when taken sick. The heifers were worth $15 apiece.

Q. How has that sickness affected those two cows and those two heifers?

A. I don't consider them worth anything now.

Q. State what you think the two cows now worth, the market value.

A. I don't think them worth anything.

Q. State what you think the two heifers are now worth.

A. They might be worth $3 or $4 apiece.

Q. What would those yearlings heifers be worth now if they had not been sick?

A. I should judge $18 or $20, at least.

Q. State whether you buried the 11 that died.

A. Yes, sir.

Q. Were they principally young or grown, those 11 that died?

A. The majority were fat cattle and milk cows.

GEORGE TERRILL.

JOHN HOCH, recalled, says: I notice in the Emporia Republican what purports to be a list of allowances for Texas-fever damage, and among them my own as follows: 7 two-year-old steers, $159; 4 one-year-old steers, 60; 6 two-year-'ld heifers, 36.00. This is an error. The seven two-year-old steers was appraised at $196 and were worth that. The 4 one-year-old steers were appraised at $18 each and were worth it. I only lost 3 two-year-old heifers, 2 of which were appraised at $17 each and the other at $17.50. I also lost 6 cows, one of which was appraised at $30, the other five at $26 each and were well worth that. I buried all twenty of these animals and have never been paid anything therefor.

JOHN HOCH.

My name is George M. Scoggins; I reside at Hartford, Lyon county, Kansas, and am well acquainted with the parties in this suit. I know H. R. Scoggins and the Brogans. I knew when the Brogans and Hosier Bros. shipped into Hartford, Kansas, a bunch of cattle about the 1st of May, 1892, and another bunch about
104 June 15th, 1892. I am a brother of H. R. Scoggins and know that the cattle he owned and located about three miles from Hartford, Lyon county, Kansas. I know when the Brogans started with that bunch of cattle between the 1st and middle of May, 1892, and drove them across to the Brogan ranch, in the southeast corner of Chase county, Kansas. When driving the cattle from Hartford, Kansas, to Chase county, Kansas, the Brogans drove along the very route that the H. R. Scoggins cattle were pastured on. The cattle of H. R. Scoggins were well and hearty at that time.

Q. State whether, after the Brogans drove the Texas cattle along, by, and through the cattle of or the range occupied by the Scoggins cattle, Scoggins' cattle took sick and died.

A. A part of them did.

Q. How many in all died?

A. Fifty-one head.

Q. You may now describe them, giving their kind and value.

A. There were native cattle. 24 three-year-old steers died, 11 two-year-old, 12 cows, 1 steer, and one heifer calf. The 24 — year-old steer- were good, smooth, and straight cattle; the 11 two-year-old steers were smooth, straight cattle.

Q. What is your knowledge concerning the market value of those three years old and two years old at that time?

A. At that time we did not consider the cattle were ready for the market. He was aiming to hold them and feed them.

Q. What would it have cost to have fed the three years old, to have fitted them for the market?

A. Labor and everything included would not have been about $15 per head.

Q. After fitted for the market, what would they have been worth?

A. I do not know what the market was when fitted for the market at that time.

Q. State the condition of the three-year-old and two-year-old steers.

A. I considered that they were doing well and in good shape at the time they were taken sick.

Q. At the time they took sick, what was the fair market value of the three-year-old- and two-year-olds?

A. I was not then acquainted with the Kansas City market.

Q. State how many of those or whether all of them died.

A. Those that I have described all died. The 24 head of three years old died; the 11 head of two-year-olds died; the 14 cows and 1 heifer and steer calf died.

Q. What disease did they die of?

A. They died, as I consider it, of Texas fever.

Q. State who buried those cattle, and what it was worth to bury them.

A. I help-bury all of them; it cost the plaintiff at least five dollars a head to bury them.

Q. Before the Hosier Bros. shipped the cattle to Hartford, state whether the cattle of Scoggins were healthy or not.

A. They were.

Q. State whether or not H. R. Scoggins, before these Texas cattle were driven through the country, went to the Brogans or Bucher, from whom Scoggins rented the pasture, and requested the same to be protected from these cattle and the disease they were liable to communicate.

A. He requested Bucher to put the fence through before the cattle were driven through the range. He also spoke to Stratton about it.

Q. What, if anything, did the defendants Brogan say to Stratton about the liability of the railroad and the State?

Cross-examined:

105 Q. What did you count in to make the cost of burying the cattle amount to five dollars a head?

A. I counted to get any one to do it, and the time lost in doing it at that time of year.

Q. How many workmen were they and how much time did it take?

A. It took two of us and a team as much as half a day to bury one.

DICKSON:

Q. You said that H. R. Scoggins spoke to Bucher and Stratton. How did you know? Were you present?

A. I was not present; I know it by hearsay.

Questioned by plaintiff:

Q. State whether or not you saw ticks on the animals that died of Texas fever.

A. I did; plenty of them. In patches the animals were covered with them.

Q. How did these animals act when they died? Describe their symptoms.

A. They would take sick, droop around; the milk cows would dry up in twenty-four hours after you would notice they were sick. The urine that would pass from them was dark and looked to be bloody.

Q. How many, if any, of these cows were choice milk cows?

A. Six of these milk cows were choice milk cows.

Q. How many of H. R. Scoggins' cattle which did not die were injured by this disease?

A. They were ten three-year-old steers, eight twos and three cows, and six calves.

Q. Explain how the three-year-old steers were injured and in what way.

A. In the way that they are no better now than they were when they took the fever.

Q. How much were the three-year-olds reduced in value by that disease?

A. They were reduced one-half in value.

Q. How much were the two-year-olds reduced in value by that same disease?

A. The twos were reduced twelve dollars and a half per head, at least.

G. M. SCOGGINS.

My name is Winnie Baysinger. I live about three miles from Hartford, Lyon county, Kansas. My age is twenty-three past.

Q. Did you know the cattle which H. R. Scoggins owned on the 1st of May, 1892?

A. In a general way I knew the bunch.

Q. You may state if you know of those cattle taking sick and dying in the summer of 1892, after the Brogans drove the Texas cattle from Hartford to Brogan ranch.

A. I know some of them took sick and died.

Q. You may state if you noticed the ticks on the cattle that died, and how many.

A. I noticed ticks on them, and that there was more on some than others; sometimes there would be a place where they would be thick. After they were dead I saw one tick on a dead steer.

Q. State how many of the Scoggins cattle you help- bury and how many of them and when you buried them.

A. On July 18th I buried a roan steer and a three cow; on July 19th I buried one cow and one steer; on July 20th, I buried three three-year-old steers; on July 21st I buried three three year-old steers; on July 22nd I buried one three-year-old steer; on July 23 I buried two two-year-old steers and two cows; on the 25th I buried two three-year-old steers, one two — old steers, and one cow; on the 26th I buried one two-year-old steer and one cow; on the 27th I buried three two-year-old steers; on July 31 I buried one cow.

106 Q. Were those cows and steers of Scoggins' ordinary or choice animals?

A. They were good cattle.

Q. What was it worth per head to bury those cattle?

A. If I had nothing else to do I would not do it for less than three dollars a head.

Cross-examination:

Q. What did Scoggins pay you for burying those cattle?

A. I was working for him by the month, myself and team, for or at the rate of thirty dollars a month. We spent ten days burying these cattle.

WINNIE BAYSINGER.

G. M. SCOGGINS recalled:

Q. Describe the cattle that belonged to H. R. Scoggins, as to whether they were good, smooth, or rough.

A. In my judgment they were good, smooth, choice cattle.

Q. Were those cattle of Scoggins which died of the Texas fever buried by or for him?

A. For him; yes.

Q. State whether the native cattle along the route which these Texas cattle were driven, from Hartford to Olpe Gen, took sick and died of this Texas fever or not.

A. Yes; they did. The cattle along the lane where they were driven died.

G. M. SCOGGINS.

WINNIE BAYSINGER, being recalled, says:

I lost one animal, a big red bull, worth twenty-five dollars. He was in Scoggins' pasture when Scoggins' cattle died. He died the same as the rest of the cattle that had the Texas fever, and, to the best of my knowledge, had the Texas fever. It was the same symptoms and the same disease that all the rest of the cattle died of.

WINNIE BAYSINGER.

Q. State your name, age, place of residence.

A. Geo. Terrill; I am thirty-seven; I live on section 16, twp. 20, range 12, Lyon county.

Q. State if you lost any cattle *and* the summer of '92; and, if so, state the kinds, numbers, and value, and of what disease they died.

A. I lost 11 head, five of which were cows, and the balance were yearling steers. I think the cows ranged from $25 to $30.00; average of about $25 on the cows; the steers were worth $20. They died between August and September. My judgment is now that they died during July and August. They died, beyond a doubt, with Texas fever. Geo. Elliott'- cow was the first that died in our neighborhood, and ours died the same as he did. A veterinarian surgeon came from Emporia and examined her and pronounced that she died of Texas fever.

Q. Were these cattle of yours at any time upon the line over which the Hosier Bros.' cattle were driven from Hartford after they were driven?

A. My cattle were on the range at the same time that these cattle were driven over.

Q. Do you know of other cattle dying apparently of this same disease along the line of the route taken by the Hosier Bros.' cattle in going west from Hartford? If so, give the names of all of those that lost cattle during the summer of 1892.

A. Al. Scoggins, he lost about 40 head; Vol Bassinger lost three or four; the next were my cattle; the next were R. M. Elliott, he lost about eight or ten; Mrs. Schinbarger about five or six; Geo.

Elliott lost two head; Jno. Bolton lost some three or four;
107 Mr. Hutton lost one; Dietrich Fox lost a few, I do not know how many. He lives on section 18, I think. Mrs. Jones lost quite a number. John Hughes lost ten or twelve. He lives in the section immediately north of me. Lawrence Dresher lost some five or six.

Q. So far as your observation extended, did all of these cattle die of the same disease?

A. Well, I would think so, of all that I saw die.

Q. Were they so situated that they all had access to the route over which these Hosier cattle went or to different ranges on which they pastured?

A. Yes, sir; they did.

Q. So far as your knowledge or information is concerned, was there any other general epidemic or disease among the cattle in Lyon county during that sum-er except among those which had had access to the trail over which the Hosier cattle went or the open ground upon which they pastured?

A. No, sir; do not know of any cattle being sick.

Q. State your occupation.

A. I am a farmer, handling stock more or less all the time.

Cross-examined by Mr. DICKSON:

Q. Did you ever have before this July or September that you speak of any experience with this Texas or Spanish fever?

A. No, sir; I never had any experience with it.

Q. Your statement that they died of Texas fever is based upon what you have heard of the disease, the general opinion, and of the opinion of the veterinarian?

A. I would judge that is all that I have got to go by.

Q. Can you take any one head of the cattle you lost and give the symptoms and the — it acted upon the time you first noticed anything the matter until they died?

A. Well, this one that I have reference to first I noticed stopped grazing, and we tried to drive it with the other cattle through a lane, and it appeared crazy and would run over any one and did run against the fence out into the road and went south, and that was the last I saw of it till the next morning.

Q. Did your cattle that died, or the most of them, exhibit some of the symptoms, different individuals affected differently?

A. Well, all of my cattle were affected the same except the one that did the running. I could tell when I went to the herd the ones that were sick the way they acted.

Q. Did you make or have made any examination to ascertain whether the cattle affected had fever or not?

A. Outside of that one I do not think we examined any more. We thought that was sufficient from what the physician said.

Q. Who was the veterinary surgeon that examined your cattle?

A. Dr. W. H. Richards, of Emporia.

GEORGE TERRELL.

Q. State your name, age, residence, and occupation.

A. James Hutton; age, 40; farmer; live in Elmdale township, S. 16, 20, 12.

Q. State if during the summer of 1892 you lost any cattle from a contagious disease; if so, state the number, kinds, and the disease that they died of, if you know.

A. I lost one cow worth $36.00; she died of, as I presume, *of* Texas fever.

Q. State if she ranged over the trail taken by the Hosier Bros. cattle or upon the open ground upon which they grazed.

A. She ranged upon the open ground that they passed over.

108 Q. State if this cow had ticks on her.

A. Yes, sir; she had ticks.

Q. State the sym-tons that you observed that your cow died of.

A. First thing th-t I discovered was the failing of her milk, then a dropping of the ears, also a failure to eat, and the ticks that I found upon them.

Q. Did you know of quite large numbers of cattle dying of a disease, the symptoms similar, that were along the line of the trail over which the Hozier Bros. cattle passed in the summer, that they had been driven?

A. I do know of quite a number.

Q. Have you any information—did you ever hear of cattle dying in like manner in Lyon county during that season except such as had access to that trail or to land on which those cattle grazed?

A. I did not.

Cross-ex. by Mr. DICKSON:

Q. Have you ever had any experience with the Texas, splenic, or Spanish fever outside of the cattle along this trail affected last summer?

A. I never have.

JAMES HUTTON.

Q. State your name, age, residence, and occupation.

A. F. G. Soule; I live on S. 34, 20, 11; I am a farmer.

Q. State if you lost any cattle in the summer of 1892 by contagious disease; if so, state what that disease was, kind, and value of the cattle.

A. I lost six head of milk cows; to the best of my information they died of Texas fever; they were worth $30.00 per head.

Q. Did they go upon or over the trail taken by the Hosier Bros. cattle or upon lands on which they pastured?

A. They did; the trail was between my house and Milk lot.

Q. State if all the cows that you had thus died.

A. They did.

Q. State the symptoms of this disease of which they died.

A. First I noticed was the failing of the milk, drooping of the head and ears, and a stiffness or a lameness; they refused to eat. I did not notice ticks on them till most of them had died.

Q. State if the cattle that went over and along this trail and the land on which the Hosier Bros. cattle grazed, to a greater or less extent, died of similar symptoms.

A. They did.

Q. Commencing at a point where Mr. Terril left off, state if the cattle, to a greater or less extent, died of this disease along the line after the trail turned south from the S. W. corner of S. 14, 20, 11, down to your place and then west along that place.

A. They did. Commencing at my place and going west, Mr. Janker lost 14, Isaac Hawbecker lost twelve, Mr. Coleman about a dozen, Mr. Stuctel lost five head, Mat. Swager five. My son, Harry Soule, lost 1.

Q. State whether or not wherever native cattle were exposed to this trial or land upon which these Hosier Bros. cattle grazed sickened and died of this same disease.

A. They did.

Q. Did you hear of cattle in Lyon county or elsewhere dying with any epedemic disease except such as were thus exposed?

A. I did not.

Cross-examination by Mr. DICKSON:

109 Q. Have you ever had any experience with Texas, Spanish, or splenic fever other than the cattle which were sick in the summer of 1892 along the line that you speak of?

A. I have some.

Q. When and where?

A. The first was in 1866 and '7 and some at different times after that.

Q. Was your experience of them at that time considerable and so that you noticed the symptoms and results of the disease?

A. I cannot say that it was considerable, but I knew of it, and it was the same as it was at this time.

Q. At the time you speak of was the cattle sick then; had they been exposed to cattle from the southern country?

A. Yes, sir.

Q. Do you know whether the native cattle which at that time sickened and died had these ticks upon them?

A. Not from personal examination. I had general information to that effect.

F. G. SOULE.

Q. State your name, age, place of residence, and occupation.

A. Michael Janker; 39 years old; S. 3, 21, 11. I am a farmer.

Q. State if, during the summer of 1892, you lost any domestic cattle from any contagious disease; and, if so, state the nature of the disease, the numbers, kinds, and value of such cattle.

A. I did, of Texas fever, 12 head of cows, heifers, and steers; I think about 8 or 9 cows, 1 bull, 2 two-year-old steers, 1 yearling steer, yearling heifer. Total value all worth $300.00.

Q. State if all of these cattle were exposed by going upon the trail

taken by the Hosier Bros. cattle or upon land on which they were held.

A. Yes, sir.

Q. State if you had other cattle exposed and if they became sick with the same disease.

A. I had 9 other head, 4 of which were sick.

Q. State the symptoms exhibited by these cattle that were sick and died.

A. Cows would fail in their milk, and they used to separate alone and hang down their ears, get stiff, and would not eat. They had ticks on them.

Q. State is the domestic animals that were exposed to the trail of the Hosier Bros. cattle to a greater or less extent sickened and died of this disease during that summer.

A. They did.

Cross-examined by DICKSON:

Q. State if the cattle that you lost were all the cattle that you had, and state whether any of those that either sicken- or died had ticks on them.

A. No; I did not see any, although I looked for them.

MICHAEL JANKER.

Q. State your name, age, place of residence, and occupation.

A. Isaac Hawbecker; 73 years; sec. 4, 21, 11. I am a farmer.

Q. State if you, during the summer of 1892, lost any domestic cattle by any contagious disease; and, if so, state what that disease was, number, kinds, and value of the cattle lost.

A. I lost some cattle of this Texas disease, 11 head—8 cows, 1 steer, and 2 heifers. The cows were really worth $25.00 a head, steers worth $15.00, heifers worth $12 apiece.

Q. Were all of these cattle exposed to the trail taken by the Hosier Bros. cattle or to ground where they were pastured?

A. They were exposed on the open ground where the Hosier cattle were kept all night.

110 Q. Did you have any other cattle than these that died?

A. Yes; I had seven head. I do not know that they were sick, but they did no good thereafter.

Q. Describe the symptoms of those that died?

A. They had most of the time standing still, head drooped and ears drooped; did not notice ticks on them. I did not look.

Q. Did the domestic cattle generally that were exposed by the trail of the Hosier Bros. cattle become sick with this same disease, as far as your observation and knowledge goes?

A. Yes, sir; all along the trail.

ISAAC HAWBECKER.

Q. State your name, age, place of residence, and occupation.

A. Joseph Kuhlamn; age, 44; I live on S. 28, 20, 11; occupation, farmer.

Q. State if you lost, during the summer of 1892, any domestic

cattle from contagious disease; and, if so, state the kind of the disease, number, kind, and value of such cattle.

A. There was 12 head of cattle and they died of Texas fever, I think. There were two steers, one heifer, and 9 cows. Cows' worth and all together would be about $300.00.

Q. State if these cattle were exposed to the trail taken by the Hosier Bros. cattle or open ground upon which they grazed.

A. Yes, sir; they were. I live immediately north of section 33, on which the cattle were held all night.

Q. State the symptoms by your cattle before their death.

A. Those cows failed in milk; lingered from two to five days before they died.

Q. Did you have any other cattle than those that died that were exposed to the disease?

A. I did. I had 31 head altogether, including 5 head of calves. All but three of them were sick. I noticed tick- on those that were sick and those that died.

Q. State if any cattle died of this disease or with symptoms like those that your cattle had except such as were exposed by going upon the trail of the Hosier Bros. cattle or the ground upon which they were held, so far as you know.

A. They did not.

Q. State if the native cattle that went upon that trail to a greater or less extent died of this disease.

A. Yes; they did.

Cross-examined by DICKSON:

Q. Have you had any experience with Texas, splenic, or Spanish fever before the summer of 1892?

A. I did not.

Q. Did any professed veterinary surgeon see your cattle?

A. Not my own, but my neighbor's—Mr. Structel. They all run on the same range.

Q. Did y-u notice ticks on your cattle that were not affected?

A. No, sir; I did not. I did not look for them.

R. D. by CUNNINGHAM:

Q. Were the symptoms of the disease of which Mr. Strictle'- cattle died the same as those exhibited by your cattle?

A. The appearance and action of the cattle were all the same.

JOS. KUHLMAN.

Q. State your name, age, place of residence, and occupation.

A. Joseph Strutzel; 38 years old; S. 28, 20, 11. I am a farmer.

Q. State if, during the summer of 1892, you lost any domestic cat-le by contagious disease. If so, state what that disease was, number, kind of cattle, and value.

111 A. I lost five head of Texas fever, 4 cows and 1 yearling steer. Value cows, $25 head; steer, $18.

Q. State if these cattle have been exposed to the range on which the Hosier Bros. cattle were held all night.

A. They were. They ranged on section 33, where the cattle staid all night.

Q. State if these cattle or any of them were examined by a veterinary surgeon. If so, state his name.

Q. They were; first one that died was examined by a surgeon we understood to be from Emporia.

Q. Did all of your cattle die of the disease that this first one had?

A. They did.

Q. State the symptoms.

A. Looked droopy; did not care to eat; live about four or five days. I had fifteen altogether. Four of these sickened of the same disease.

Q. State if the cattle generally in your neighborhood on the trail where these cattle were driven sickened and died.

A. They did. Whenever I looked I found ticks on them.

JOSEPH STRUTZEL.

Q. State your name, age, place of residence, and occupation.

A. G. E. Bodine; age, 30; sec. 30, 20, 11.

Q. Did you lose any cattle in the summer of 1892 of a contagious disease? If so, state what disease, number, kind, and value.

Q. I did; Texas fever; lost one two-year-old heifer; value of $18; had exposed 12 head.

Q. How was this animal exposed to the fever that you know?

A. By running on the range over which Hosier Bros. cattle were driven.

Q. State if you had any other cattle that were exposed; if so, if any of them became sick.

A. 11 of them were exposed, besides the one that died.

Q. Give the symptoms of the two that were sick.

A. First she was stiff; did not *to* go off to feed; drooping head and ears.

Cross-examined by DICKSON:

Q. Were your cattle all equally exposed as far as you know?

A. They were.

Q. Did those of your cattle that were sick or those that were not sick have ticks on them, as far as you know?

A. I did not notice ticks on the one that was sick and got over it. One of the milk cows that did not get sick I noticed ticks on.

Q. Do you know anything about this Texas fever or have you had any experience with it except this outbreak in the summer of '92 that was called Texas fever?

A. No, sir.

G. E. BODINE.

Q. State your name, age, place of residence, and occupation.

A. John Schroder; forty-three; live on section 25, 20, 10. I am a farmer.

Q. State if you lost in the summer of 1892 any domestic cattle

by any contagious disease; and, if so, state what such disease was, how many, the kind, and the value thereof.

A. I lost eight head. They died of Texas fever. Five milk cows, three steers, three years old. The cows were worth about $30.00 apiece. The steers were worth about $35.00 apiece.

Q. Did these cattle range along the trail taken by the Hosier Bros. cattle or upon any open ground where they were held?

A. Yes; I had them there.

Q. How many cattle of yours all together were exposed?

A. There were twenty-two head.

112 Q. Were any of the balance sick?

A. Those that did not die got sick and are getting better.

Cross ex. by Mr. DICKSON:

Q. How do you know they had Texas fever?

A. They had the same sickness as the rest.

Redirect by Mr. CUNNINGHAM:

Q. Describe the symptoms of the cattle.

A. They drooped their head and frothed at the mouth.

JOHANN SCHRODER.

Q. State your name, age, place of residence, and occupation.

A. Joe Wagoner; I am 55 years; I live on section 35, 20, 13; I am a farmer.

Q. State if in the summer of 1892 you lost any domestic cattle from any contagious disease; and, if so, state what that disease was, how many, what kinds, and the value of such cattle.

A. I lost 8 cows with the Texas fever. They were worth $200.00.

Q. State if those cattle had been exposed by going upon the trail or range where the Hosier Bros. cattle had been.

A. Yes; they were on the range; my cattle were on the range when Hosier Bros. drove their cattle along.

Q. How many head all together had you exposed, and how many, if any, were sick besides those that died?

A. I had 18 head altogether and was sick besides those that died.

Q. State whether or not the domestic cattle in your vicinity that were exposed by going where these Hosier cattle had been driven to a greater or less extent sickened and died of this same disease.

A. Yes; the same disease.

Q. State the symptoms which those that died exhibited.

A. They drooped their head down and stood around and could not eat anything.

Q. Did you know of the cattle of John Scroder being sick?

A. No; I did not see them; I knew he lost some that season about that time.

Cross-examined by Mr. DICKSON:

Q. Were all your cattle equally exposed to the trail the Hosier cattle were over?

A. Yes; they were.

Q. Have you ever had any experience with Texas, splenics, or Spanish fever other than the sickness that you had in your neighborhood in the summer of 1892?

A. No; I never had any.

JOSEPH WAGNER.

Q. State your name, age, residence, and occupation.

A. Anthony Kienne; thirty-one; I live on sec. 36, 20, 10; I am a farmer.

Q. State if during the summer of 1892 you lost any domestic cattle from contagious disease; if so, state what what disease was, the number, kind, and value of the cattle lost.

A. I lost five head from Texas fever; yes, sir; 4 cows and 1 two-year-old heifer. The cow was valued at $22.00, heifer at $12.00.

Q. State if these cattle had been upon the trail or pasture where the Hosier Brothers cattle had been after the Hosier cattle had been driven through your neighborhood.

A. Yes, sir.

Q. How many cattle altogether had you thus exposed?

A. Four besides those that died, one of which was sick of the same disease, but did not die.

Q. What were the symptoms exhibited by these cattle?

A. By holding their head down to the ground and would
113 not eat, that is the way it commenced.

Q. Did you notice any ticks on those that died or on those that were sick?

A. I noticed a few on those that died and a great many on the one that did not die. I did not find ticks on all that died; found but two on one; did not look on the others.

Cross-examined by Mr. DICKSON:

Q. You say your cattle were sick with a contagious disease. What makes you think it was contagious? Did they communicate it to any other cattle?

A. This was a certain sickness and all the cattle commenced to die at the same time, and not cattle*d* died except those that went on the Hosier Bros. trail. Everybody told me that it was Texas fever and that Hosier Bros. cattle gave it to them.

Q. Did you ever have any experience or acquaintance with Texas fever before the cattle commenced to be taking sick in your neighborhood?

A. No; I never have.

ANTHONY KIENE.

Q. State your name, age, place of residence, and occupation.

A. Mat. Swaiger. I am 44 the second of January. I live on sec. 27, 20, 11.

Q. State if you lost during the summer of 1892 any domestic cattle by contagious disease. If so, state the nature of the disease, kind, and value.

A. I lost 4 cows and 1 heifer, coming two years, I believe, of Texas fever. I think all together they ought to be worth $120.00.

Q. Had these cattle been upon the train over which the Hosier Bros. cattle had been driven at that time?

A. Yes, sir.

Q. What were the symptoms that they give before their death?

A. They get lame and lay down and do not eat any more, keep their head to the ground for two or three days, and then die.

Q. Did you have any cattle die or get sick in this manner that did not go upon this Texas cattle trail?

A. All of my cattle were upon this trail.

Q. How many cattle altogether did you have that was thus exposed?

A. Eight head besides the one that died; one was sick and one got well.

Cross-examined by Mr. DICKSON:

Q. Did you see the Hosier cattle when they were being driven through?

A. Yes; I did.

Q. When was it?

A. I do not know what day, but I saw them driven through.

MATHIAS SWAIGER.

Q. State your name, age, place of residence, and occupation.

A. Sam. McKee. I am 32 years old. I live on section 19, 20, 13; I think three and a half miles southwest of Hartford. I am a farmer.

Q. During the summer of 1892 did you lose any domestic cattle by any contagious disease? If so, state the nature of that disease, the number and kinds of cattle lost, and their value.

A. I lost one cow, supposed to be Texas fever, valued at $25.00. I had another cow that was exposed. She was never sick. I never noticed any signs of sickness.

Q. When this cow that died — exposed to this fever by
114 going upon the trail that the Hosier Bros. cattle were driven?

A. Yes; she was.

Q State whether or not the cattle generally in your neighborhood that was thus exposed did to a greater or less extent become infected and sick and die with a disease exhibiting symptoms like those with which your cow died.

A. Yes; they did.

Q. Did you see any ticks on either of your cows?

A. The one that died was covered with them, and the one that was not sick I only saw two on her.

SAM. McKEE.

Q. State your name, age, place of residence, and occupation.

A. Matthias Maurin; I am 30 years old; 27, 20, 11; I am a farmer.

Q. Did you in the summer of 1892 lose any domestic cattle from

any contagious disease? If so, state the number, kind, and value of them?

A. I lost three milk cows from what the people say it was Texas fever. I never saw it before. The three cows ought to be worth $80. Lost two two-year-old heifers worth $15.00 apiece; one two-year-old steer worth $19.00.

Q. State whether or not these cattle have been exposed to this disease by going upon this trail taken by the Hosier Bros. herd of Texas cattle.

A. They was on that prairie over which this herd went.

Q. State the symptoms that your cattle showed during their sickness.

A. Droop head down pretty near to the ground. My cattle run with Structell's. I had 13 cattle altogether; besides the six that died three were sick with the same disease and got well. On the cattle that were dead I saw ticks, but did not look on the cattle that were alive.

Q. State if those of your cattle that were sick and died exhibited the same symptoms as did Mr. Structel's at the same time.

A. They acted the same.

Cross-examined by Mr. DICKSON:

Q. Did you see Structel's cattle while they were sick?

A. Yes; I saw his cattle.

Q. Did you see the Hosier cattle when they were being driven through?

A. I saw a drove of cattle; did not know whose it was.

Q. Did you before this time know anything about Texas fever, or did you have any experience with it?

A. I never saw it.

MATHIAS MAURIN.

Q. State your name, age, place of residence, and occupation.

A. Harry L. Soule; I am 24 years old; last summer I lived on 34, 20, 11; I am a farmer.

Q. State if in the summer of 1892 you lost any domestic cattle by any contagious disease; if so, state what that disease was, number, and kinds and value of the cattle lost.

A. I lost one cow; supposed to be Texas fever; valued at $40.00.

Q. Had this cow been exposed by going upon the or coming in contact with the trail taken by the Hosier Bros. cattle?

A. She went over the trail twice a day after they had passed along and grazed on section 33, where they were camped over night.

Q. State the symptoms of the cow during her sickness.

A. First thing was the failing of the milk; the she would go off by herself, droop her head, and her ears would hang down, and had no desire to eat. This was the only animals I had exposed by going through the trail. I noticed a good number of ticks on her.

HARRY L. SOULE.

115 Q. State your name, age, place of residence, and occupation.

A. L. W. Owtrum; age, 46; section 5, 21, 11; I am a farmer.

Q. State if during the summer of 1892 you lost any domestic cattle by any contagious disease; if so, state the nature of the disease, number and kind of the cattle lost.

A. I did; Texas fever; four head—two cows, two two-year-old steers; value of the cows, $50.00; steers, $40.00.

Q. Were these cattle exposed to this fever by going upon the trail over which the Hosier Bros. cattle were driven or by pasturing on the open land where they had been?

A. Both ways.

Q. Did you lose any cattle that had not thus been exposed?

A. No, sir.

Q. How many cattle altogether had you thus exposed?

A. Twenty-one head, of which number 6 or 8 were sick, besides those that died.

Q. State the character of the symptoms of the sick cattle.

A. They were not all the same; loss of ap-et.te, ears drooping down; seemed to be suffering intense pain and had a fever, so much so that they were almost crazy.

Q. To what extent were the domestic cattle in your neighborhood that went upon the trail or pasture where the Hosier Bros. cattle had been affected with this disease?

A. Every herd that was exposed, more or less of them died.

Q. Commencing with the line west of Olpe, where the line turned west, to what extent where the domestic cattle—had access to the trail or to open ground where this Texas herd grazed affected with this disease?

A. So far as I know, every herd that came in contact with the trail were affected sick and died.

Q. Were cattle not coming in contact with this trail simi-arly affected?

A. They were not.

Cross-examined by Mr. DICKSON:

Q. Did you have any experience with Texas or Spanish fever before this disease broke out up there?

A. No, sir.

Q. Did you see the Hosier cattle driven through?

A. I did.

Q. How long after was it before any of yours became sick?

A. About 60 days from the first herd and 30 from the second.

Q. When was the second herd driven through?

A. I think about the 14th of June.

L. W. OSTRUM.

Q. State your name, age, place of residence, and occupation.

A. Adam Bitler; age, 49; sec. 36, 20, 10; farmer.

Q. State whether or not in the summer of 1892 you lost any do-

mestic cattle by contagious disease; if so, state the nature of the disease, the number, kind, and value of the cattle lost.

A. I lost 13 head; supposed to be Texas fever; 2 years-old steers worth $30.00, 4 one-year-old steers worth $18.00 each, five cows and two heifers cows worth $15 to $20; all worth $75.00.

Q. Did these cattle come in contact with the trail of the Hosier Bros. herd?

A. Yes; they were on the trail and among the cattle.

Q. What were the symptoms with which your cattle died?

A. Got to be droopy and hung their heads down and seemed to be in pain.

Q. Now, generally were the cattle in your neighborhood that had been exposed by being upon this trail affected by this disease?

A. They were all about like mine; they were generally affected.

Q. Mention the names of those in your neighborhood who lost cattle about the same time with the disease having the same
116 symptoms that your cattle had.

A. Mr. Haber, Mr. Bollard, Mr. Bowers, John Scwarder, Mrs. Westfall, Cris. Creger, John Patch, Anthony Kienne, Mr. Funk, Mr. Stratton, Tom Robinson, and Geo. Bodine, Brier boys.

Q. Outside of the cattle that came in contact with the trail or range where these Hosier Bros. Texas cattle had been, do you know of any domestic cattle that died of any disease exhibiting symptoms like the ones that you have mentioned?

A. I did not.

Cross-examined by Mr. DICKSON:

Q. How many cattle did you have when these died?

A. 25; they were all equally exposed.

Q. Of those that were exposed and did not die, how many were sick?

A. I think that there were seven that had the same symptoms as those that died.

Q. Did you have any experience with Texas, splenic, or Spanish fever?

A. No, sir; I never did.

ADAM BITLER.

Q. State your name, age, place of residence, and occupation.

A. J. F. Stratton; 64 years old. I live on 11, 21, 10. I am a farmer.

Q. State whether or not in the summer of 1892 you lost any domestic cattle by any contagious disease. If so, state what that disease was, number, kind, and value of the cattle lost.

A. I lost 15 head, Texas fever; 8 cows, worth $25; two steers, worth $50; five heifers, worth $16 apiece.

Q. State whether or not these cattle had been driven upon the trail over which the cattle of the Hosier Bros. had been driven prior to their being thereon.

A. They had.

Q. State the symptoms shown by these cattle of yours that have died.

A. Milk cows ceased to give milk, drooping of head and ears, seemed to be in great pain.

Q. How many cattle altogether did you have exposed to this disease?

A. Twenty-one.

Q. Were there any sick that did not die?

A. Four sick.

Q. State whether or not domestic cattle generally in your neighborhood that were exposed by going upon this trial to a greater or less extent were affected by this disease.

A. They were.

Q. Were any of the cattle in your neighborhood — had not thus been exposed affected by this kind of disease?

A. Not that I know of.

Q. State, if you know, whether or not the domestic cattle along the route taken by Hosier Bros. cattle west and south of where you live and which had come in contact with this trail were generally affected with this disease.

A. They were.

Q. State what experience you have had before this time in observing Texas, splenic, or Spanish fever.

A. None; I saw it in Illinois 30-odd years ago. The symptoms were the same as now.

Q. To what extent did you notice this in other people' cattle?

A. I saw them along the line west of the cemetery to the Brogan ranch, in Chase county.

Q. State whether or not the symptoms in all these cattle were the same or otherwise.

A. About the same, and were like those observed in my own.

Q. State whether or not you made any examination of these cattle after their death and with whom.

117 A. I did with Veterinary Richards, of Emporia; he came down; one of Mr. Haber's just died on the range; it was dissected; pronounced it Texas or splenic fever. He also examined some of my cattle that were sick.

Cross-ex. by Mr. DICKSON:

Q. In this one that was cut open what did you find different than what ought to be in a healthy animal?

A. I do not believe I could explain that.

J. F. STRATTON.

Q. State your name, age, place of residence, and occupation.

A. Chas. Haber; age, 57; occupation, farmer; sec. 12, 21, 10. I am the plaintiff in this action.

Q. During the summer of 1892 did you lose any domestic cattle of any contagious disease? If so, state what it was, the number of the cattle, and the kind lost.

A. Yes, sir; 54 head of Texas fever; 8 three-year-old steers, 9

two-year-old steers, 1 yearling heifer and steer; balance were cows and heifers; total value about $1,340.00.

Q. State whether or not these cattle had been upon the trail of these Texas cattle of Hozier Bros. after the Texas cattle had gone by.

A. They were on the range where they passed over and also where they grazed.

Q. How many cattle altogether did you have exposed at that time?

A. 93 head.

Q. Besides these that died how many cattle did you have sick and did not die?

A. Cannot say, but the most of them were affected.

Q. How much less was the balance of your cattle worth by the reason of their having been sick than they would have been had they not been so affected?

A. My judgment is that they were worth $195.00 less.

Q. State whether or not your cattle were examined by a veterinary surgeon; if so, state who the surgeon was.

A. Dr. Richards, from Emporia. He cut one open after it was dead and examined it.

Q. Did you see the one that Dr. Richards examined at different times from the time that it commenced to get sick until it died?

A. I did.

Q. State how the symptoms of this animal compared with those of the balance of those that were sick and those that died.

A. About the same.

Q. From your observation of all of them, including this one examined by the doctor, what would you say as to whether or not the disease — which the balance of them died or were sick was the same as that with which this one died?

A. Symptoms were the same.

Q. State to what extent you observed this disease among the cattle of your neighbors.

A. Immediate neighborhood; Jessie Stratton. I saw the same cattle as those mentioned by Adam Bitler.

Q. How did the symptoms of those cattle that you saw compare with the symptoms—compare with the animal examined by Dr. Richards and yourself?

A. About the same.

Q. Did you examine any of the cattle that died or were sick to see if they had ticks on them; if so, how many did you examine?

A. I cannot say how many I examined, but all that I did examine had ticks.

118 Cross-examination by DICKSON:

Q. Did you ever have before this disease broke out up there any experience with Texas or splenic fever?

A. No, sir.

CHARLES HABER.

Q. State your name, age, place of residence, and occupation.

A. Grif. P. Jones; 46 years of age; 16, 21, 10; farmer.

Q. State whether or not in the summer of 1892 you lost any domestic cattle by contagious disease; if so, state the kind, number, and value.

A. I lost 14 head by Texas or splenic fever—10 cows, worth $300; 1 bull, worth $300; 1 two-year-old heifer, worth $16.00; 2 steers, valves $8.00 apiece.

Q. Did these cattle of yours go upon the range or along the trail where the Texas cattle of Hosier Bros. were driven?

A. Yes; they crossed the trail; I had to drive them across the trail in driving them to the pasture and back.

Q. How many cattle did you have thus exposed?

A. About thirty-five or forty head.

Q. Besides those that died how many were sick?

A. Only one.

Q. Describe the sickness or symptoms of this disease.

A. Ga-nted, drooped ears, and noticed holding head down to ground.

Q. State what other cattle you saw sick by this disease besides your-.

A. Stratton and Patch's, I suppose, and Haber's cattle.

Q. State whether or not your cattle were affected like Haber's cattle.

A. Yes, sir; they were the same as Mr. Haber's and Mr. Stratton's.

Q. State whether or not there were any cattle, so far as you observed, affected in this manner except such as came in contact with the trail or range where these Hosier Texas cattle had been.

A. None.

Q. Did you notice whether or not the animals that died or were sick had ticks on them; if so, in what numbers?

A. I noticed none on the well cattle.

Cross-examined by DICKSON:

Q. Have you ever had any experience with this Texas or splenic fever before this?

A. No, sir.

G. P. JONES.

Q. State your name, age, place of residence, and occupation.

A. My name is E. W. Everetts; age, 59; Olpe, Kansas, Lyon county; general merchandise.

Q. State whether or not you lost any cattle in the summer of 1892 from contagious disease; if so, kind, value.

A. I lost one milk cow on the 16th of January, 1892.

Q. State the symptoms that that cow exhibited at the commencement of her sickness until her death.

A. First we noticed she dropped off in her milk in the fore part of Nov., 1892. She was sick about two or three weeks, perhaps longer; then she partially recovered; held her head down, ears drooped,

and acted like other sick cattle that I had seen. She was taken sick again about 60 days from the first time. She dried up; did not give any milk. Her symptoms were the same as the first time, only worse.

Q. When was the last opportunity that she had of going upon the trail or ground where these Texas cattle had been?

A. Had opportunity every day she was out of the yard till about the 1st of December, except when she was sick.

Q. Was your cow in the habit of or did she range as far
119 west as the road along which these cattle were driven in the spring of 1892?

A. I don't think she went over there as late in the fall.

Q. Where, then, was the opportunity afforded so as to expose her to this contagion?

A. By crossing the trail of these same cattle when they were brought by the receiver to be loaded to be shipped away.

Q. State if you are acquainted with the value of such animals at the time she died in Olpe.

A. I think I am.

Q. You may state what the value of this cow was.

A. I place it at $25.00.

E. W. EVERETT.

HOWARD RHODES:

Q. State your name, age, residence, occupation.

A. Howard Rhodes; 34; Argentine, Kansas; inspector of Bureau of Animal Industry, United States Department of Agriculture.

Q. How long have you been such an inspector?

A. It will be four years next April with the Government and one year prior thereto in Kansas.

Q. State whether or not some time about the 1st of May, 1892, you were at Fort Worth, Texas; and, if so, in what capacity and for what purpose.

A. I was at Fort Worth in the fore part of May to supervise shipments of cattle coming from Texas west of the quarantine line.

Q. Acting in that capacity, did you see and inspect any cattle coming over the Texas Pacific railroad from the West delivered to the M., K. and T. railroad at that point billed to Hosier Bros., Hartford, Kansas; and, if so, about how many and how many train-loads?

A. I saw one train; if I remember right, second shipment.

Q. State whether or not you examined these cattle for the purpose of ascertaining whether or not they were safe cattle to ship to Kansas and what you ascertained relative to their condition and what your conclusion was relative to their safety.

A. In passing up along the train where the cattle were being unloaded, and upon going inside the cars to see whether the cars had been cleaned, I picked up several ticks on the car floor*d;* and in going on up to where they were unloading the cattle, as the cattle passed out of the cars, I noticed that quite a number of them had ticks on. In looking over the cattle, after they had been watered, I

should judge one-half of them had ticks on them. I had my doubts as to their safety.

Q. What circumstance was it that made you think the cattle were not safe shipped to Kansas?

A. The cars not being disinfected and the cattle being ticky.

Q. Do you regard the presence of Texas cattle, *kicks* upon Texas cattle coming from southern or southwestern Texas, as a suspicious circumstance?

A. I do.

Q. In what respect and why do you so regard it?

A. I look upon them with a suspicion of their communicating the Texas fever.

Q. Do you know what the generally accepted theory amongst those who are fairly well posted as to the indication by the presence of ticks upon such cattle is?

A. I do.

Q. You may state whether or not the presence of such ticks is generally regarded as a suspicious circumstance.

A. It is.

Q. Did you have any difficulty in noticing the presence of these ticks?

A. I did not.

120 Q. Were they easily observed?

A. They were.

Cross-examined by T. N. SEDGWICK, att'y for the M., K. and T. R'y:

Q. How long was you inspecting these cattle?

A. Perhaps a half hour or three-quarters.

Q. Can you tell from the inspection of an animal how long it has been infected with Texas fever or how long it has had ticks upon it?

A. I cannot tell.

Q. Can you tell by the inspection of an animal from what section of the country it comes with reference to the quarantine lines?

A. Yes, sir; by the brands.

Q. Did you inspect the brands on these cattle?

A. Yes, sir.

Q. What would you say now as to where they were from, inside or outside of the quarantine line?

A. It is pretty hard to tell, as this ranch is right on the line, and the cattle range all over the country.

Q. What was your conclusion at the time as to whether these cattle were from inside or outside of the line?

A. I knew that Hosier Bros.' home ranch was in Pecos county and west of the quarantine line. I could only tell by the brands where they came from.

Q. Where is the Government quarantine line now established?

A. It runs west of there now.

Q. Do you know why the line was changed by the Department of Agriculture?

A. Because of the Hosier Bros. cattle spreading the fever in Lyon and Chase counties.

Q. Did Hosier Bros. cattle take Texas fever or any of them die of it?

A. Not to my knowledge.

Q. What does that fact indicate to you, Mr. Rhoads, as an expert?

A. That any animal that gives Texas fever would not take it themselves.

Q. Did I understand you to say, Mr. Rhoads, that you picked up inside of the car—some ticks that is, one of the cars in which these cattle came?

A. Yes, sir.

Q. Did you come to any conclusion at the time as to where the ticks that you picked up came from?

A. I did.

Q. Where?

A. They came off Hosier Bros.' cattle. The rubbings together inside the car and the rubbing as they came out the car rubbed them off.

Q. Then, as a matter of fact, you believe, and the Department of Agriculture believes, that Hosier Bros.' cattle became possessed of the ticks prior to being loaded on the cars?

A. Yes, sir.

Q. Do you know at what point these cattle of Hosier Bros. were loaded into the cars?

A. Midland, Texas.

Q. Is Midland inside or outside, east or west, of the Government quarantine line?

A. West of the line.

Q. Mr. Rhoads, were you ever down on the Pecos river at a point where Independence creek empties into it and from that point down the Pecos river to where it is crossed by the Southern Pacific R. R. track?

A. No; I was not.

Q. You do not know, then, whether cattle can cross or not at the various points along the line?

A. I have no personal knowledge in regard to it.

Q. What is the duty of an inspector, Mr. Rhoads, and what were your duties at Fort Worth?

A. My duties were to see that the railroad companies dis-
121 infected the cars, and that the cattle shipped to Kansas were from north and west of the Government quara-tine line.

Q. How do you ascertain the fact as to whether the cattle are from north or west of the line?

A. By brands and owners.

Q. Have you any other means or source of information for ascertaining that fact?

A. I cannot say that I have.

Q. Is the permit given the owner issued prior to the loading of *of* the cattle or after the cattle arrive at Fort Worth?

A. Most generally before.

Q. How does the inspector determine the fact as to whether the cattle are such as may, under the rules and regulations of the Department of Agriculture, be shipped?

A. By owners and brands.

Q. What office do the affidavits by the owner and his neighbors perform?

A. My understanding is that these affidavits which you refer to are not required by the rules and regulations of the Department of Agriculture, but are required by the State live-stock sanitary board of Kansas.

Q. You may state, Mr. Rhoads, whether you knew, at the time these cattle were shipped, of the rules and regulations put in force by the live-stock sanitary board of the State of Kansas regarding the shipment of cattle from north and west of the Government quarantine line.

A. I did know of them.

Q. State whether or not it was any part of your duty as inspector at Fort Worth to see that those rules and regulations were complied with by the shipper.

A. Yes; it was a part of my duty to see that the rules and regulations of the Kansas live-stock board were enforced, but these cattle already had a permit.

Q. You say you talked with the shipper at Fort Worth; do you know his name?

A. I did not.

Q. Mr. Rhoads, what difference did it make, if the cattle had ticks on them before loading in the cars, whether the cars were disinfected or not?

A. The regulations had not been complied with.

Q. If the cattle had ticks on them or were inoculated with Texas fever before being loaded into the cars, would the fact that the cars had not been disinfected increase the danger, so far as these cattle and the liability of them to Texas fever was concerned?

A. I think not.

Cross-examined by H. D. DICKSON for Hosier Bros.:

Q. You notified the shipper that the cars had not been disinfected?

A. I merely asked him for information.

Q. Did you communicate that fact to any person connected with the railroad or only to Mr. Dean?

A. I may have talked about it in Fort Worth, but I notified Mr. Dean right away. I did not say anything to any one connected with the railroad that day; it seems to me now I went right up to the clerk and had a talk with him about it.

Q. You say it was a part of your duty to see that cars were cleaned and disinfected in accordance with the Kansas regulations; when you found they were not did you do anything more than simply report it to Mr. Dean?

A. Generally I stopped it right there.

Q. Why did you not stop those cars?

A. They had been already furnished with a Kansas permit.

Q. Did the Kansas permit allow cattle to be shipped in
122 cars that had not been disinfected?

A. I wired for permission to stop them and was told to let them go.

Q. Fort Worth is a place, is it not, where cattle pass through both from what is considered the healthy and unhealthy district?

A. Yes, sir.

Q. What is their arrangement about yarding cattle separately?

A. They have two sets of yards there, one called the Kansas yards, which was for cattle coming west of the line for Kansas.

Q. Where were these cattle yarded when they were unloaded?

A. In the Kansas division.

Q. Had there other cattle been unloaded in those yards to your knowledge, but a short time before, that under the rules ought not to have gone there?

A. There had not, to my knowledge.

Direct examination:

Q. Notwithstanding the fact that permits have been issued by the state sanitary board of Kansas to ship these cattle, was it not your opinion then, and is it not now, that they were liable to communicate the Texas fever to the native cattle of Kansas?

A. Anything that has ticks on, coming from that southern country, I look upon with suspicion, and I did then believe them to be liable to communicate disease.

HOWARD RHOADS.

Q. State your name, age, residence, occupation.

A. Wm. A. Rogers; forty-seven; Wyandotte county; stock dealer.

Q. How long have you been in the stock business?

A. Twenty-odd years.

Q. Have you ever had any experience with what is known as the Texas cattle fever; and, if so, to what extent?

A. I have been an observer for a number of years and have seen a good many cattle that were reported to have the fever. At Abilene, in the '70's, I saw cattle die, and they said they had the Spanish fever. I have seen them here at the yards and in Topeka, and have known of numerous other instances by hearsay and by direct observation.

Q. What has been your observation as to the connection between the presence of what is known as the Texas cattle tick and this Texas or Spanish fever?

A. I believe that cattle may have ticks and not have the fever, but I am of the opinion that the general rule is that where they have fever they have ticks.

Q. State whether or not, in your opinion, based upon your observation, the presence of these Texas cattle ticks is a circumstance

that is suspicious and would lead you to believe that the cattle were liable to communicate Texas or Spanish fever to the native or domestic cattle in Kansas.

A. That would be owing to the section of the country from which the cattle came.

Q. Suppose the cattle came from a low altitude, say the eastern portion of Pecos county, Texas, how would you then regard the presence of ticks in considerable quantities in Texas cattle?

A. I would consider ticky cattle from a low altitude and southern Texas suspicious. I would be afraid that they might communicate the Texas fever.

Q. State if you are acquainted with the views of the best informed people upon this matter.

A. I know their views.

123 Q. Is there a difference of theories among these men upon this subject?

A. Yes, sir.

Q. State the different views h l by these men.

A. Some hold that it is micr s; some that it comes from the saliva; some that it is excreme some that it is from fatigue in driving and overheating.

Q. Is it now very generally accepted that the presence of Texas cattle ticks upon cattle brought from southern Texas is a circumstance of a very suspicious nature, pointing to the fact that such cattle will communicate Texas or Spanish fever to the native or domestic cattle of Kansas?

A. That is my theory and I have quite a number of supporters, and the theory is quite considerably accepted.

Q. Do you know any one handling cattle that would not regard the presence of ticks upon such cattle as a suspicious circumstance? I mean among those who know anything about the Texas fever or have investigated it.

A. I do not.

Cross-examination by T. N. SEDGWICK, att'y for M., K. and T. R'y:

Q. Mr. Rogers, are you an educated veterinarian?

A. No, sir.

Q. Have you ever read any works by educated men—I mean educated veterinarians—upon the subject of Texas fever?

A. No, sir.

Q. Then your entire knowledge of the subject of Texas fever is derived entirely from your observation of cattle that were diseased, which you were informed was the disease known as Texas or Spanish fever?

A. Not entirely.

Q. Please state what other sources of knowledge you have on the subject.

A. Articles by different people and discussion with men who have had experience with the disease.

Q. Were these articles that you read written by men learned?

A. I believe so.

Q. Is your theory based upon your reading of these articles which you refer to?

A. Partly by reading and partly by observation.

Q. Were not these articles which you refer to as having read on the subject of Texas fever newspaper articles, and were the writers of them or any of them known to you?

A. I have read them in newspapers and in books, and I knew the writers by reputation only.

Q. Can you name any of them at the present time? And, if so, you may do so.

A. Dr. Salmon is one of them. He is chief of the Bureau of Animal Industry.

Q. Was the article from his pen published in a newspaper or in a book?

A. My impression is that I saw it in our live-stock paper.

Q. Is that the only article you read from his pen?

A. I could not tell that, as I do not know.

Q. Can you name any other writer whose articles on the subject you had read?

A. No; I do not recall the names at present.

Q. What books have you read on the subject?

A. I could not tell that.

Q. Is it not a fact, Mr. Rogers, that the tick theory became settled in your mind prior to the reading of these articles and books which you refer to, and that that theory is based entirely upon your own observation of cattle, which it was claimed by others were affected with Texas fever?

A. Yes, sir.

Q. At the time that your formed this theory in regard to ticks, all you know as to whether the cattle you observed had Texas
124 fever was what other parties stated to you about them?

A. Yes; I could not tell; I am not a doctor.

Q. Do you know whether any of the parties who stated to you at the time that the cattle were affected with Texas fever were educated veterinary surgeons?

A. I don't know that they were.

Q. Is it a difficult matter for one who has had somewhat of experience, though he be not a veterinary surgeon, to determine whether or not cattle dying are affected with the Texas fever?

A. Murrain is very similar to Spanish fever, and if disease occurred where the conditions are such that we would reasonably expect Texas fever there would be no difficulty in determining. The symptoms of the two diseases are so similar that it would require a surgeon to determine.

WM. A. ROGERS.

125 GEORGE ATKINSON was examined by Judge Cunningham and testified as follows:

Defendant railroad company objected to this witness testifying for the reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company, and in addition made same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant railroad company excepted.

Q. State your name.
A. George Atkinson.
Q. Where do you live?
A. In Americus township.
Q. Did you have any cattle during the summer of '93 in the pasture of John Patch?
A. Yes, sir.
Q. You know John Patch?
A. Yes, sir.
Q. You know of his grazing cattle down there?
A. I do.
Q. Whose cattle were down there in his custody besides yours?
A. Mr. Slisher; he had 112 head there.
Q. Did any of your cattle die down there?
A. Yes, sir.
Q. Did you see them at the time they were sick?
A. This stock of my own?
Q. Yes.
A. Not the first one that died, but the second one that died, why, I did.
Q. You saw the second one while it was sick?
A. Yes, sir.
Q. What symptoms did it have?
A. Well, I'll tell you: At the time that I seen that animal I didn't pay but very little attention to it. I felt a little bit blue. I think it would be on the 14th day of October we went after the cattle—Mr. Slisher and one of his sons and myself. We went into the pasture to kind of round them up. We had an idea that some of them would be so they couldn't go home, and Mr. Patch told me that one of mine had died the morning before. I had 20 head there, and I found 18 of them, and there was one that I couldn't find. As has been stated here, they kind of saunter off by themselves. I found this heifer in a hollow off from the other cattle, all by herself.
Q. Did you get this one home?
A. No; I never moved her. She died the next morning after I left with the cattle, on the 15th.
Q. What kind of cattle were these two?
A. Two-year-old heifers, in good beef fix.
Q. Did you know the value of that kind of cattle at that time?
A. I supposed I did.
Q. You are handling cattle?

A. I have been for quite a while.
Q. What was the fair market value of those two?
A. I estimated them at $20 apiece. They would weigh a thousand pounds, and figuring them at two cents a pound, what they were paying here.
Q. You put the value of those two animals at forty dollars?
A. Yes, sir.
126 Q. Were there any other dead animals there about that time in that pasture?
A. Mr. Slisher lost six.
Q. Mr. Patch lost a very large number?
A. He did.

Cross-examination:

Q. I understood you to say that you lost two 2-year-old heifers?
A. That's right.
Q. Now, in what way, if you know, did the Hozier Brothers cattle communicate any disease, of any kind, to your two heifers that died?
A. Well, I think they camped one night on the east side of Patch's pasture.
Q. You don't understand that any of Hozier Brothers' cattle were driven through this pasture at all?
A. I do not.
Q. And you don't understand that your cattle got out and traversed over any of that route?
A. That would be just my judgment, that they got out.
Q. Now, do you know anything about that?
A. No; I don't. I said it was my judgment.
Q. These cattle were in the pasture when you found them?
A. That's right.
Q. You have no knowledge that they ever got out of the pasture at all?
A. No, sir.
Q. Now, Hozier Brothers' cattle never went through the pasture?
A. No, sir.

Redirect examination:

Q. What time did you take your cattle out to Patch's pasture?
A. The 7th of May.
Q. They were with Patch's cattle continuously on through the season?
A. Yes; in Patch's care.

LEE WRIGHT was examined by Judge Cunningham and testified as follows:

Defendant railroad company objected to the testimony of this witness as incompetent, irrelevant, and immaterial, and for the reason that there was a misjoinder and excess of parties defendant claiming affirmative reliefagainst defendant railroad company, and because the jury was incompetent to try more than one case.

The objection was overruled; to which defendant railroad company excepted.

Defendant railroad company objected to the introduction of any evidence under the cross-claim of this defendant for the reason that it was incompetent, irrelevant, and immaterial; that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company, and that the alleged damages claimed were to- remote, speculative, and not proper damages to be considered by the court and jury.

The objection was sustained; to which plaintiff excepted.

Q. You may state if you had control of a pasture in the southwest corner of Lyon county during the summer of '92.

Defendant railroad company objected to the question upon the ground that it tended to prove the same claim that the court had just ruled out.

By Judge CUNNINGHAM: I am now seeking to prove the claim of the Eureka Springs Cattle Company.

Defendant railroad company objected to all evidence as to the claim of the Eureka Springs Cattle Company as incompetent, irrelevant and immaterial for the reason that there was a misjoinder and excess of parties defendant claiming relief against defendant railroad company, and because the claim had been submitted
127 to the commissioners appointed by the court to consider the amount of damages sustained by the various parties, and that the commissioners found nothing for the plaintiff concerning this claim, but did find further that the whole matter was submitted to the court, and because the jury was incompetent to try more than one case. The objection was overruled by the court; to which defendant railroad company excepted.

A. You asked me if we had control of a pasture.

Q. Yes.

A. Yes, sir.

Q. Whose cattle, if any, were in the pasture?

A. We had the Eureka Springs Stock Company's, Henry Giger's, and ourselves.

Q. Did the Wright Brothers lose any cattle?

A. No; none of ours died.

Q. State if the Eureka Springs Cattle Company lost any cattle.

A. They lost six.

Q. What kind were they?

A. Two and three year old Arizona steers.

Q. What has been your business for the last three or four or five years?

A. Pasturing and handling cattle in a general way.

Q. Do you know the market value of this kind of cattle at that time?

A. Well, this kind of cattle ran from eighteen to twenty-seven dollars in value.

Q. I ask you whether you knew or not.

A. Yes.

Q. Now, you may state what it was.

Defendant railroad company objected to the question for the reason that the Eureka Springs Cattle Company was not a party to the suit. The objection was overruled; to which defendant railroad company excepted.

Q. Tell us what kind of cattle they were that died.
A. Two and three year old Arizona steers.
Q. What were the values of them?
A. You want to know my value?
Q. No; the value of those cattle that died.
A. There was a valuation put on them by the officers.
Q. No; what were they worth?
A. They were worth about twenty to twenty-five dollars a head.
Q. Take these six cattle.
A. Twenty-two dollars and a half.
Q. That was the average value of the six cattle?
A. Yes, sir.
Q. Besides the six cattle that died, were there any others that had the disease that were damaged?
A. Yes; there were two or three besides those that we lost.
Q. Which would you say, two or three?
A. There were three head that we noticed with the disease.
Q. To what extent were those damaged that had the disease and recovered?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. I should think probably five dollars a head.
Q. Do you mean they depreciated that much in value?
A. I mean those that showed signs of fever that we saw in the pasture.
Q. How many cattle did you have altogether that belonged to the Eureka Springs Cattle Company?
A. 196.
Q. What kind of cattle were they?
A. They were two and three years old Arizona steers.
Q. What was their condition in June and July?
128 A. In June and July they were in pretty fair condition, not fat, but fair flesh; they had been doing well.
Q. In what does the value of such cattle consist?
A. It consists in their value as feeders.
Q. What do you mean by feeders?
A. I mean cattle that are kept awhile and fed grain or run through the winter and kept till they are a year or so older when they fatten better and become more marketable—more desirable for beef.
Q. Does the value of such cattle consist in their weight value at that time or in their value as frames on which to build a beef?

Defendant railroad company objected to the question as leading.

The objection was overruled; to which defendant railroad company excepted.

A. Well, I would say their values as frames on which to make more beef.

Q. Do you know if those cattle were exposed to contagion by Hozier Brothers' cattle? Tell the jury how that was.

A. They were exposed by parties who had charge of the herd driving the cattle through the pasture.

Q. Was the pasture enclosed?

A. Yes, sir.

Q. How did they get into the pasture?

A. They opened the gate on the one side and drove through and out the gate on the other side.

Q. Did they have any permission from you or anybody in charge there to do this thing?

A. No, sir.

Q. At what time were those cattle disposed of by you for the Eureka Cattle Springs Company?

A. They were shipped to Kansas City in October.

Q. For what purpose?

A. For sale as beef. They were shipped to get out of them what could be had; sold as beef by orders of the sanitary board.

Q. Was their greatest value to be obtained by selling them as beef?

A. No; their value was chiefly as feeders—feeding cattle.

Defendant railroad company objected to all this testimony for the reason that it did not tend to show any proper measure of damages. The objection was overruled; to which defendant railroad company excepted.

A. Shipped for beef because they were considered not safe as feeders; fear that the disease would show in the cattle later on.

Defendant railroad company objected to the last answer of the witness. The objection was sustained: to which plaintiff excepted.

By the COURT to the jury: Gentlemen of the jury, that last answer is withdrawn from your consideration.

Plaintiff excepted to the ruling of the court in withdrawing the answer.

Q. What was the difference in value of these cattle as feeders and what you obtained for them as beef?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and as tending to show no proper measures of damages. The objection was sustained; to which plaintiff excepted.

Q. What was the difference per head in these animals in their market value shipped for the best disposition that could be made of them under the live-stock commission order and to have kept them as feeders?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and as not tending to show any proper measure of damages. The objection was sustained
129 by the court; to which plaintiff excepted.

Q. What was the difference in value per head of this herd, if any, by reason of their having been exposed to the Texas fever in the manner in which you have described?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and as calling for an opinion and not a statement of fact. The objection was sustained; to which plaintiff excepted.

Cross-examination by Judge KELLOGG:

Q. There was a regular road passing through this large enclosure that you have denominated the pasture, passing into and through the gates?

A. What do you mean by a regular road?

Q. I mean a regular traveled road for all the people.

A. No; there were parties in that neighborhood who were in the habit of going through that way, if that's what you mean by a regular road. There was no laid-out road, no public road.

Q. Was there not a plain, well-traveled road there that people had been using for years passing through this pasture through which you say these cattle were driven?

A. Not all the people. There were certain neighbors there that frequently used that road.

Q. Wasn't it open to the general public?

A. No; it was not a road that was open to the general public.

Q. What was there to prevent them from using it?

A. Any one that opened the gate without permission and went through could use it—that is, he did use it. If we were there and chose to stop him we could. It wasn't any laid-out road.

Q. Wasn't it pretty frequently used as a highway, as a public road?

A. It was very frequently used; yes.

Q. Was it the main road from the region of country on the west side of the pasture down through to the east and towards Emporia?

A. No, sir; the main road was south about three-quarters of a mile or a mile. I am not certain which.

Redirect examination:

Q. It was not generally used for people to drive herds of cattle through there?

A. No; not in a general way. It was done frequently.

Recross-examination:

Q. Driving cattle through there was no uncommon occurrence; it had been done before?

A. Yes; it had been done frequently.
Q. Without objection on the part of you people?
A. That was the first year we ever had anything to do with it.
Q. For years people had been in the habit of driving cattle through?
A. I can't say for years. I know such things had been done. Cattle had been driven through there before.

The plaintiff here dismissed the claim of Wright Brothers against the railroad company, without prejudice, so far as any damage to their stock was concerned.

Dr. W. H. RICHARDS was examined and testified as follows:

Q. What is your age?
A. Thirty-one.
Q. Your profession?
A. Veterinary surgeon.
Q. Where were you educated as a veterinary?
A. Toronto, Canada.
Q. Are you graduated from a veterinary college?
A. Yes, sir.
Q. When were you graduated?
A. In the spring of '87.
Q. Have you been practicing your profession since that time?
A. Yes, sir.
Q. Were you called during the summer of '92 to examine
130 any cattle that were sick in the southern part of Lyon county and in Chase county?
A. Yes, sir.
Q. State to the jury the places you were called to and the examinations you made and the conclusions you came to about the disease there found.
A. The first was about eight miles south of town; the next was at Hartford.
Q. What date was that south of town?
A. I don't remember the date exactly.
Q. July 20th?
A. Yes; just about that.
Q. How many post mortems did you hold then?
A. Two.
Q. Whose place was that?
A. It was an open pasture; several cattle on.
Q. Whose cattle were they; do you know?
A. Billy Johns was the one I held the post mortem on.
Q. Did you find any sick ones there?
A. Yes.
Q. Any considerable number?
A. Yes, sir.
Q. What symptoms did they have; the sick ones?
A. First, they were noticed away from the herd mostly; heads

down, ears hung down, and they would stagger, weave in their gait.

Q. What disease did those symptoms indicate?
A. Texas fever.
Q. You say you held a post mortem there?
A. Yes, sir.
Q. What did you diagnose the disease to be?
A. Texas fever.
Q. Where next did you make an examination?
A. I think it was at Hartford next.
Q. In whose herd?
A. It was Scoggins Brothers.
Q. About what time was that?
A. It was about two or three days afterward.
Q. Did you see any sick ones there?
A. Yes, sir.
Q. Any considerable number of dead ones?
A. Yes, sir.
Q. What symptoms did you find there?
A. Found the same symptoms.
Q. What was your conclusion as to the disease?
A. Texas fever.
Q. Was anybody with you there assisting in the post mortem?
A. Yes, sir.
Q. Whom?
A. Professor Meyer, of Manhattan.
Q. What is his business?
A. He is a veterinary surgeon.
Q. In what institution?
A. The Experimental College at Manhattan. He is a professor of medical science there.
Q. Did you agree in your conclusions relative to the disease?
A. Yes, sir.
Q. Where next did you go?
A. I think the next was in Chase county.
Q. Whose herd?
A. It was the large ranch where the Texas cattle were.
Q. Farrington and Lantry's?
A. Yes; Mr. Farrington's cattle and Lantry's.
Q. On the Brogan ranch?
A. Yes, sir.
Q. Do you remember about when that was?
A. I think about the 23rd. I have the date.
Q. What did you find there?
A. I found several sick ones, the same as before.
Q. A great many dead ones?
A. Yes, sir.
Q. Did you observe the symptoms of the sick ones?
A. Yes, sir.
Q. Did you make a post mortem there?
A. Yes, sir.

Q. What did you diagnose the disease to be?
A. Texas fever.
Q. Where next did you see any if at all?
A. Wright Brothers' cattle and along the trail two or three other places.
131 Q. Altogether how many examinations and post mortems did you make? Do you remember?
A. Five or six.
Q. Did you make one on Stratton's?
A. Yes, sir.
Q. And did you examine Patch's pasture any?
A. Yes, sir.
Q. Now, you may tell the jury what disease you found that to be that caused the death of these cattle.
A. Texas fever was what I found.
Q. What would you say, from your examination of the sick ones and the post-mortem examinations that you made of the dead ones, was the disease with which the cattle were affected that died in the southern part of Lyon county and in Chase county during the summer of '92?
A. Texas fever.
Q. To what extent did you travel over this trail?
A. We were, I expect, over two-thirds of it.
Q. What are the most prominent and most easily observed symptoms of Texas fever, those symptoms that would strike the ordinary non-professional observer the quickest?
A. The first would be they would go away from the other cattle mostly or stand in water and secretion would stop—secretion of milk; head down and ears drooping, labored breathing, trembling muscles, and they would stagger in their gait.
Q. State if you noticed on any of those cattle that you examined, sick, well, or dead, any Texas cattle ticks.
A. Yes, sir.
Q. Did you on all of them?
A. I don't think I examined all of them.
Q. I mean those you did examine.
A. Yes, sir.
Q Do you know the most approved and generally accepted theory amongst veterinarians and those who have observed and had actual experience as to what the presence of those ticks—cattle ticks—on cattle recently brought from the South indicate?
A. Why, usually that they are liable to give Texas fever—suspicious.
Q. What do you say as to the dangerous indications of the presence of the Texas cattle tick on such cattle?
A. They would be very liable to give Texas fever.
Q. Isn't it true that in a great majority of instances such cattle will give the Texas fever to the domestic cattle of this country?
A. Yes, sir.
Q. Isn't that a well-recognized fact among men who have investigated or paid any attention to this matter?

A. Yes, sir.

Q. What is the generally accepted theory as to the communication of Texas cattle fever—as to how it is communicated?

A. By ticks.

Q. And that the presence of ticks is a sure indication of the ability of cattle possessing them to communicate the Texas fever?

A. If from the South, yes.

Q. Did you examine or hold any post mortems on the cattle of Hugh C. Jackson?

A. Yes, sir.

Q. What did you find ailing those cattle?

A. Texas fever.

Q. When did you first see those Hosier Brothers cattle?

A. I never saw them.

Q. You didn't see them in the pasture over there?

A. They had taken them out and taken them by themselves.

Q. State what sort of a disease Texas fever is.

A. It is a disease of the red corpuscles of the blood.

Q. What causes it?

A. A micro-organism.

Q. You mean a minute animal that is not discernible to the naked eye?

A. Yes, sir.

Q. And that organism gets into the circulation?

Defendant railroad company objected to the question as leading.

Q. You can tell how this little "bugger" gets in his work.

132 By the COURT:

Q. State fully how the disease operates and what is the effect of it.

A. It is inoculated into the system with the tick and it acts on the red corpuscles of the blood; causes a breaking up of the red corpuscles and congestion, inflammation, blood-poisoning.

Q. What is the life history of the Texas tick? I mean by that, how is he enabled to inoculate our native cattle?

A. The ticks brought in on the Texas cattle drop off when they are matured; lay their eggs in about a week. They are hatched in about twenty days. Then they are ready to attach onto the cattle, any native cattle they find, and produce the disease.

Q. Is this disease imparted to the native cattle in any other way than by ticks?

A. It may be.

Q. How?

A. It may be carried by flies or other insects.

Q. Is it necessary that this micro-organism be introduced into the circulation?

A. Yes, sir.

Q. Would the feeding of this micro-organism to our native cattle ordinarily produce the disease?

A. Not often; no; not apt to.

Q. It would not unless there was some internal lesion by which they might obtain access to the circulation?

A. No, sir.

Q. Did I ask you what your conclusion was as to the disease with which the Farrington and Lantry cattle died?

A. I think you did.

Q. What was your answer?

A. Texas fever.

Q. Did you see these Texas fever ticks on any of the sick or dead ones over there?

A. Yes, sir.

Q. There were a number of cattle in the pasture, I suppose?

A. Yes, sir.

Cross-examination by Mr. SEDGWICK:

Q. You never had any experience with Texas fever before until this time, did you?

A. Yes, sir.

Q. Where?

A. About seven miles northeast of Emporia—seven to ten miles.

Q. In what year was that?

A. I couldn't tell exactly now. About five years ago, I think.

Q. Was that about the time that Stahl and those parties lost cattle up there?

A. No; there was some movers driving through.

Q. You didn't see Hozier Brothers' cattle?

A. No, sir.

Q. You have frequently noticed cattle that were shipped up from Texas, have you not?

A. Not a great many; no.

Q. I will ask you if it is not a fact that Texas is crossed by a quarantine line.

A. Yes, sir.

Q. I will ask you if there are not portions of the State of Texas where the cattle are just as healthy as though they had been raised in Kansas.

Plaintiff objected to the question as not proper cross-examination, and for the reason that the witness had not been shown to know anything about it. The objection was sustained; to which defendant railroad company excepted.

Q. If the cattle are from Texas, Doctor, is that any indication that they are capable of communicating Texas fever?

A. It would be according to what part they were from and the season of the year.

Q. If the cattle are from north or west of the Government quarantine line as established, isn't it a fact that they are not likely to communicate Texas fever?

Plaintiff objected to the question for the reason that it had not been shown that the witness knew anything about the Government

quarantine line. The objection was overruled; to which plaintiff excepted.

133 A. Yes, sir.

Q. Now, Doctor, if cattle are from north or west of the Government quarantine line, would the fact that these ticks appeared upon them indicate that they were liable to communicate Texas fever?

A. Yes, sir.

Q. The ticks alone would indicate that, would you think?

A. Yes, sir.

Q. Notwithstanding the fact that they were from the healthy district of Texas?

A. Yes.

Q. I will ask you if it is not a fact that cattle raised in timbered countries or ranging in timbered countries have ticks upon them.

A. More or less.

Q. Then in the presence of the tick alone any indication that the cattle will communicate Texas fever or are likely to do so?

A. Yes.

Q. That of itself?

A. It is according to where they are from.

Q. I say the presence of the tick alone on cattle.

A. No.

Q. That is no indication that they will communicate Texas fever?

A. Not conclusive; no.

Q. You may describe this tick and the size of it, Doctor.

A. It is about the size of a pea.

Q. And whereabouts on an animal does it attach itself?

A. Mostly about the flank and udder, the tender portions.

Q. Can you tell, as an expert, on simply noticing a Texas animal in a casual way, whether it is capable of communicating Texas fever?

A. No, sir.

Q. Can a person not an expert do that?

A. No, sir.

Q. It is a fact that there are various ways of communicating this disease, isn't it?

A. Yes, sir.

Q. Might it not be done by the soil—that is to say, could not the soil be transported and the native cattle be driven over it, and would not they be likely to contract the disease in that way?

A. Not so apt to.

Q. Does it make any difference how the animal becomes inoculated with the disease? Is it absolutely necessary that there should be a tick to carry the disease from one animal to another?

A. No, sir.

Q. If the cattle belonging to Hozier Brothers were healthy cattle, could they have contracted the disease, after being loaded in the cars, in such a way as to communicate it to the native cattle in this country?

Plaintiff objected to the question as not being cross-examination. The objection was sustained; to which defendant railroad company excepted.

Q. Will one native animal give it to another, as a general thing?
A. No.
Q. What does the fact that these cattle, apparently were healthy and none of them died of Texas fever, but did communicate the disease to other cattle—what does that indicate to you as to whether or not the cattle were healthy or unhealthy at the time they were loaded on the cars? I mean Hozier Brothers' cattle, as to being infected or inoculated with the disease known as Texas fever.
A. Do you mean that they were below the line or that they were natives? Is that the meaning of your question?
Q. Yes.
A. I should they were liable to give the disease below the line.
Q. The question is whether they became so liable after the
134 shipment or before.
A. Before.
Q. Now, then, I will put the question to you. Could they have become inoculated with the germs of Texas fever so as to communicate it to native cattle after having been loaded into the cars for shipment?

Plaintiff objected to the question as not being proper cross-examination. The objection was overruled; to which plaintiff excepted.

A. No, sir.
Q. Doctor, you stated that you held post-mortem examinations. What did you mean by that?
A. Examined them after death; the internal organs and the post-mortem symptoms.
Q. I wish you would explain to the jury just exactly what you found in that examination that indicated to you Texas fever.
A. The spleen was enlarged and pulp was dark; the liver was lighter in color and mottled in appearance; the urine was port wine and the bowels contained—they were colored from bile; the bile was dark in appearance and thick and ropy.
Q. Were those all the symptoms that you noticed in the internal organs?
A. No; the kidneys were inflamed and dark in color.
Q. What other disease is there that resembles Texas fever in its external and also internal symptoms?
A. Anthorax.
Q. What is it?
A. It is bloody murrain; that is one name for it.
Q. Is there any other aside from bloody murrain?
A. Not so close; no.
Q. What is one difference between the symptoms, external and internal, of bloody murrain and Texas fever?
A. The difference is in the spleen, bowels, liver. The spleen is

not so large; the blood is not the same color; the spleen is not the same color.

Q. Then, as I understand you, a person observing a sick animal with either murrain or Texas fever would be unable from the external symptoms to distinguish which it was?

A. Some might; yes.

Redirect examination:

Q. You have no question as to what the character of this disease was?

A. No, sir.

Q. Would bloody murrain have attacked the cattle as generally as this disease attacked cattle and only along a given line?

A. No, sir.

Q. Would bloody murrain have been as likely to have developed itself on either side of a line as it would over a given stretch of country over which a herd had passed?

A. Yes, sir.

By Judge BUCK:

Q. Suppose you found a herd of Texas cattle with ticks on them to a considerable extent, do I understand you to say that that indicates that they are liable either to give that disease or else they have taken it themselves and are liable to die from it?

A. Yes, sir.

By Judge CUNNINGHAM:

Q. You say that the presence of the Texas cattle tick is not necessarily indicative of the ability of the animal on which they were found to impart it. State the exceptions to the general rule which you have laid down—that is to say, under what conditions would you say that cattle thus affected with the Texas cattle tick would not be liable to impart it?

A. The seasons of the year.

Q. Suppose you should see a herd of cattle that are long-
135 horned, wild, and undomesticated, and should be informed that they came from some place in Texas, even from the northern part of Texas, and they should be covered with Texas cattle ticks, what would you say as to whether such cattle were dangerous to domestic cattle of this State—liable to communicate Texas fever?

A. They would be.

Q. That would be your conclusion at once, would it not?

A. Yes.

Q. You said that Texas fever might be induced in other ways than by the Texas tick. State to the jury what other ways.

A. It might be carried by flies.

Q. Would it be to any great extent carried by flies along a given line across the country twenty or thirty miles?

A. No.

Q. Sedgwick asked you about the presence of ticks always being

indicative of disease. Are there not different kinds of ticks? Isn't there a wood tick as well as a Texas tick?

A. Yes, sir.

Q. And when a wood tick is indigenous it does not indicate disease? Suppose you had seen a train-load of the cattle, like those I have described, in Parsons and knew that they came from some point in Texas, and saw considerable numbers of the Texas cattle tick on them, what would you have said as to their being liable to communicate Texas or Spanish fever to the native cattle of this State in that season of the year—in May or June?

Defendant railroad company objected to this question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. I would have said they might produce it.

Q. Well, might or were liable to?

A. Liable to.

Q. Certain to?

A. Not always.

Q. Very liable to?

A. Yes, sir.

Q. What degree of certainty would there be about it?

A. If they were from the low country and they were Texas fever ticks, they would be.

Q. That was the supposition, that they had Texas fever ticks—that is, Texas cattle ticks—on them and came from a portion of Texas. What would you say as to the certainty with which you would conclude that they would impart this fever to the native cattle of this State?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. They would be almost sure to; yes.

Q. Would you or would you not consider such cattle dangerous on account of their liability to impart Texas fever to the native cattle of this State?

A. I would consider them dangerous.

Q. Doctor, look at that book and tell us what it is.

A. United States Department of Agriculture, Special Report of Texas Fever, Bureau of Animal Industry, '92.

Q. Are the statements made in this rep-rt relative to the nature of the disease of Texas fever and its communication recognized as being standard in the way of authority?

A. Yes, sir.

Q. Look at that book and state about that.

A. United States Department of Agriculture, Texas Fever, Bureau of Animal Industry, '93.

Q. Are the statements made in this book relative to the nature and means of communicating Texas fever recognized as standard authority?

A. Yes, sir.

136 Q. Recross-examination by Mr. SEDGWICK:

Q. Do you know where the Government quarantine is located in the State of Texas?

A. Not exactly; no.

Q. Do you know, from reading this book that Mr. Cunningham has handed you, where it was located?

A. I only have an idea of it from the map and reading it is all.

Q. I will ask you what the understanding among vet-rinarians and others who have investigated the question is as to the liability of the cattle north and west of this line to communicate Texas fever to our native cattle.

A. They are not liable to.

Q. Is that generally understood?

A. Yes, sir.

Redirect examination:

Q. It is generally understood that those cattle that come from south and east of that line or that have ranged over south and east of that line are liable to communicate it?

A. Yes, sir.

Q. Suppose you add to the fact that cattle have come from just outside that line the other fact that they are covered with Texas cattle ticks, then what would be the conclusions that would be drawn as to their liability to impart Texas fever?

A. They would be liable to communicate it.

Recross-examination:

Q. Could a man, not an expert, tell, from simply looking at the cattle, as to the exact location, north or west of that line, where they had been grazing?

A. No, sir.

Q. Let me ask you this question: Suppose you knew absolutely that the cattle came from west of the Government quarantine line, and yet there were apparently some ticks upon them, what would you say, then, as to the liability of the cattle to communicate the Texas fever?

A. They might communicate it.

Q. State whether or not they would be likely to.

Q. They would not be as likely as though they were below the line.

Q. Doctor, you may state to the jury whether there is a distinct little animal known as the Texas fever tick, or is that simply a wood tick that gets on the animal?

A. It is a Texas fever tick.

Q. Does that tick exist north and west of this red line known as the Government quarantine line?

A. It is not supposed to. It may at different seasons of the year.

Q. Then if you should see a car-load of cattle from north or west of the Government quarantine line and should see ticks upon them—

I have no reference to the specific cattle tick, but should see ticks upon cattle—would that be any indication that they were capable of communicating Texas fever?

A. Not conclusive.

Q. Do you know the Baker cattle that were shipped in here this spring and delivered at the yards of the M., K. and T.?

A. No.

Q. Did you examine them?

A. No, sir.

Q. You heard of the shipment?

A. Yes, sir.

Q. Do you know where those cattle were from?

A. No, sir.

Redirect examination:

Q. You say not conclusive. Do you mean by that that it wou-d be an indication?

A. Yes, sir.

Q. You say that generally the Texas tick is not found north and west of the Government line. If you should see the Texas tick on cattle, would it not lead you to the conclusion that these cattle had at least been ranging south and east of that line?

A. Yes.

137 Q. That would be the reasonable conclusion?

A. Yes, sir.

Recross-examination by Mr. SEDGWICK:

Q. I will inquire of you whether there isa ny special difference in the size and appearance of the ordinary wood tick that is on cattle and the Texas fever cattle tick that you have seen.

A. Not a great deal; no.

Q. About the same size and general appearance?

A. Yes, sir.

Q. An ordinary person not accustomed to observe carefully or not an expert would hardly be able to distinguish the difference, would he?

A. No, sir.

Redirect examination:

Q. Are these wood ticks found in large numbers on cattle that come from a prairie country?

A. I don't think they are.

147 Q. Are they found in large numbers even on cattle that are brought up in the woods?

A. No, sir.

Q. Can you tell on what parts of the body wood ticks are found even upon cattle that come from a wooded country?

A. Mostly about the ears and flanks.

138 In the District Court of Chase County, State of Kansas.

CHARLES HABER, Plaintiff,
vs.
HOSIER BROS., THE MISSOURI, KANSAS AND TEXAS RAILWAY Co., *et al.*, Defendants.

Whereas all the parties to this suit except the M., K. and T. R'y Co. have heretofore agreed upon Wm. Rodgers, John Minnick, and T. G. Wibley as referees, and said referees have taken evidence and filed a report in this cause finding the value of the stock that had died and the names of the owners thereof, and said parties have taken certain depositions—

Now, to avoid unnecessary expense, it is hereby stipulated and agreed by and between said railroad Co. defendant and all the parties claiming against said company that the depositions heretofore taken may to the extent it is material or relevant be read in evidence the same as though notice of taking said depositions had been duly served upon said railroad company.

It is further stipulated that except as to the claims of J. W. Ketcham, Hugh C. Jackson, W. C. Phillips, Olson Bros., Wright Bros., F. M. Nitre, T. E. Welch, Frank Darbyshire, and Carson and Osborn the report of said referees shall be taken as the value of the animals lost.

T. N. SEDGWICK,
Attorney for M., K. and T. R'y Co.

EXHIBIT "W."

(Title omitted.)

We, the undersigned, referees duly selected by stipulation on behalf of all the parties interested and appointed by this court, hereby respectfully report that on the 17th day of January, 1893, pursuant to such selection and appointment, we convened at Emporia, Kansas, and were severally duly sworn to the discharge of our duties, as appears by our written oath filed herein.

In the investigation of the matters to us referred we in each instance duly swore the several claimants and witnesses and took their testimony and examination under oath.

Not being able to finish our work upon said 17th of January, and it being uncertain as to whether the several parties could be duly notified and attend, we then adjourned until 2 o'clock p. m. on Tuesday, the 24th day of January, 1893, and then resumed our labors at Emporia, and at 11 o'clock at night of said day we adjourned to meet next morning at Olpe, in said Lyon county, and did so meet, pursuant to adjournment, and investigated the claims of between forty and fifty at and near that place, and then adjourned to meet on the 26th of January at Emporia, where we continued our investigation, and have been engaged at different times. Each time before resuming labor we announced in the papers of our proposed taking up and considering the evidence.

We find that on May 1st and 2nd, 1892, there were unloaded from the cars at Hartford, Lyon county, Kansas, about 1,500 head of Texas cattle belonging to defendants Hosier Bros., and on June 13th, 1892, there *was* unloaded at said city of Hartford about 500 head of Texas cattle belonging to said Hosier Brothers, and that each said bunch of cattle *were* driven from Hartford to the
139 Brogan ranch, in the southeast portion of Chase county, Kansas; that said Texas cattle so driven had been brought from Texas, shipped over the Texas Pacific and Missouri, Kansas and Texas railway; that said cattle were in a condition to and capable of and liable to communicate to the native and domestic cattle of Kansas the disease of Texas, splenic, or Spanish fever, and did in fact communicate said disease to a great many of the cattle that became exposed from the driving of said Texas cattle across said Lyon county and into said Chase county.

We further find from the evidence which we have taken that the following parties lost cattle which had become diseased from the aforesaid exposure and suffered to some extent in other ways as we have found. The following is a list of such parties as have suffered loss from said disease so as aforesaid communicated and imparted, to wit:

1. John P. Perrier claims 5 dead—5 steers, $26 each.
Allowed $130 00
2. Henry Giger, Emporia, lost 7 head, $40.0– each.
Allowed 280 00
Injured, additional, 4 steers and 1 steer, said injury being from Texas fever, with which they were at the time affected 42 00
3. Dr. H. J. Fuller, Hartford, lost 3 head—1 Holstein, $30, and 2 cows, $40. $322 00
Allowed 70 00
4. Lewis Heitzman, account Fuller, lost 3 cows.
Allowed to Fuller, as assignee 60 00
5. H. A. Bolzz, Center township, lost 2 head.
Allowed 35 00
6. Harry Stuttle, Center township, lost 3 head.
Allowed 49 00
7. A. Murphy, Center township, lost 1 cow.
Allowed 29 00
8. John Middaugh, Center township, lost 1 cow.
Allowed 20 00
9. D. J. Lewis, Emporia township, lost 4 head.
Allowed 90 00
10. Edward Jenkins, Center township, lost 6 head.
Allowed 113 00
11. J. G. Hughes, for Hughes Brothers, Center township, lost 3 head.
Allowed for 2 head 90 00
12. J. P. Rossillan, Center township, lost 4 head.
Allowed 70 00

13. Charles McKee, Elmendaro township, lost 1 cow.
Allowed..... 20 00
14. L. L. McKee, Elmendaro township, lost 1 cow.
Allowed..... 20 00
15. J. G. Rumford, Center township, lost 4 head—2 cows, $40; 1 2-year-old heifer, $12, and 1 2-year-old heifer, $8.
Allowed..... 60 00
16. Christ Kruger, Center township, lost 22 head—10 4-year-old steers, $40; 2 1-year-old steer-, $15; 1 2-year-old steer, $22; 6 cows, $20; 3 3-year-old heifers, $15.
Allowed..... 617 00
17. Patrick McCormick, Center township, lost 1 cow.
Allowed..... 20 00
18. A. Kinne, Center township, lost 4 head—1 yearling heifer, $8; 3 cows, $20.
140 Allowed..... 68 00
19. John Scroder, Center township, lost 8 head—5 cows, $20; 2 2-year-old steers, $20; 1 3-year-old steer, $30.0-.
Allowed..... 170 00
20. W. H. Watkins, Center township, lost 4 cows and 1 calf.
Allowed..... 80 00
21. R. Funk, Center township, lost 3 head—2 cows, $22.50, and 1 steer, $36.
——..... 81 00
22. J. Dunn, Center township, lost 1 steer.
Allowed..... 22 50
23. Joseph Wagoner, Center township, lost 8 cows—2 fresh cows and 6 dry ones.
Allowed..... 150 00
24. Littler Brothers, Center township, lost 8 steers and 3 cows—2 2-year-old steers, $40; 6 2-year-old steers, $180; 3 cows, $60.
Allowed..... 280 00
25. Dietrick Fox, Elmendaro township, lost 7 head—1 3-year-old steer, $30; 1 2-year-old steer, $20; 1 2-year-old steer, $15; 1 cow, $20; 2 2-year-old heifers, $24; 1 yearling heifer, $8.
Allowed..... 117 00
26. John D. Bolton, Elmendaro township, lost 2 head—1 cow, $20, and 1 yearling heifer, $8.00.
Allowed..... 28 00
27. Mathias Maurin, Center township, lost 7 head—3 cows, $60; 2 2-year-old heifers, $24; 1 yearling steer, $15.
Allowed..... 99 00
28. Isaac Hawbecker, Olpe, lost 11 head—6 cows, $120; 2 1-yr.-old heifer-, $16; 2 1-year-old steer-, $30; 1 cow, $15.
Allowed..... 181 00
29. Henry Merker, Center township, lost 1 Jersey heifer.
Allowed..... 15 00

30. Adam Bitler, Center township, lost 13 head—5 cows, $100; 2 2-year-old heifers, $24; 4 1-year-old steers, $60; 2 2-year-old steers, $40.
Allowed..... 224 00

31. G. E. Bodine, Center township, lost 1 heifer, 2 years old.
Allowed..... 12 00

32. T. M. Robinson, Center township, lost 1 milch cow.
Allowed..... 22 00

33. Mary E. McClelland, Center township, lost 1 cow.
Allowed..... 20 00

34. Matthew Sweiger, Center township, lost 4 cows and 1 calf—4 cows at $80 and 1 calf at $5.00.
Allowed..... 85 00

35. Joseph Kuhlman, Center township, lost 12 head—9 cows, $180; 1 2-year-old heifer, $12; 1 1-year-old steer, $15; 1 2-year-old steer, $20.
Allowed..... 227 00

36. Joseph Structzel, Center township, lost 5 head—4 cows, $80; 1 yearling steer, $15.
Allowed..... 95 00

141 37. Joseph Bratt, Center township, lost 4 head—2 cows, $40; 2 2-year-old heifers, $24.
Allowed..... 64 00

38. John Langley, Center township, lost 8 head—2 cows, $40; 4 ax 2-year-old heifers, $48; 1 milk cow, $25; 1 calf, $5.00.
Allowed..... 118 00

39. D. S. Starr, Center township, lost 14 head—4 cows, $75; 5 yearling heifers, $46; 2 2-year-old steers, $40, and 3 yearling steers, $45.
Allowed..... 206 00

40. Michael Janker, Center township, lost 14 head—7 cows, $140; 2 2-year-old steers, $40; 2 yearling heifers, $16.00; 1 2-year-old heifer, $12; 1 1-year-old steers, $15; 1 bull, $20.00.
Allowed..... 243 00

41. L. W. Olstrom, Center township, lost 4 head—1 Holstein cow, $30; 1 4-year-old cow, $20; 1 2-year-old steer, $20, and 1 yearling steer, $15.
Allowed..... 85 00

42. Harry Soule, Center township, lost 1 cow.
Allowed..... 25 00

43. F. G. Soule, Center township, lost 5 cows.
Allowed..... 115 00

44. John Hicks, Hartford, lost 1 cow.
Allowed..... 25 00

45. Widow Smith, Hartford, lost 2 cows.
Allowed..... 40 00

46. Dr. S. P. Reaser, Hartford, lost 1 cow.
Allowed..... 20 00

47. Mrs. L. B. Hull, Hartford, lost 1 cow.
Allowed..... 25 00

48. A. G. Shepard, Hartford, lost 1 milk cow.
Allowed..... 25 00

49. J. F. Stratton, Center township, lost 15 cattle—7 cows, $140; 5 2-years-old heifers, $60; 2 2-year-old steers, $50; 1 cow, $25.
Allowed..... 275 00

50. John Stotler, Chase county, lost 2 fat steers.
Allowed..... 104 00

51. C. W. Stotler lost 1 steer.
Allowed..... 52 00

52. S. A. Stotler, Chase county, lost 4 cattle—2 cows, $50; 2 beef steers, $104.
Allowed..... 154 00

53. M. J. Collard, Center township, lost 3 cattle—2 2-year-old steers, $48, and 1 cow, $20.
Allowed..... 68 00
Contingent damages..... 75 00

54. Carson and Osborn, Larned, lost 15 cattle at $39.50.
Allowed..... 592 50
On 23 sick cattle shipped suffering from Texas fever..... 115 00

55. H. C. Jackson, Madison, Kansas, lost 41 cattle—1 1,650-lb. native steer, $70; 16 1,425-lb. Western steers, $50; 13 1,350-lb. Western steers, $47.25; 4 aged steers, $50; 2 3-year-old steers, $30; 1 two-year-old steer, $25.00.
Allowed..... 1,889 25

142 Allowed contingent damage on 125 head compelled to be shipped, being sick with said disease..... 625 00

Could not pass upon the 117 head, as we had not evidence of values and quality.

57. P. C. Zink, Elmendaro township, lost 2 2-year-old Holstein and Durham heifers.
Allowed..... 30 00

58. T. E. Welch, Elmendaro township, lost 7 cattle—2 4-year-old steers, $80; 1 3-year-old steer, $30; 3 1-year-old steer-, $45, and 1 cow, $20.
Allowed..... 175 00

56. W. H. Zink, Elmendaro township, lost 1 2-year-old heifer.
Allowed..... 12 00

59. George E. Welch, Elmendaro township, lost 3 cattle—2 cows, $20; 1 3-year-old steer, $30.
Allowed..... 70 00

60. E. T. White, Jackson township, lost 16 head—16 New Mexico steers.
Allowed..... 256 00

61. A. A. Wilson, Hartford, lost 1 cow.
Allowed..... 20 00

62. J. A. Thompson, Hartford, lost 1 cow.
Allowed..... 20 00

63. George Terell, Elmendaro township, lost 11 head—5 1-year-old steers, $75; 2 cows, $40; 3 fat cows, $75; 1 old cow, $15.
Allowed..... 205 00

64. Guy Slead, Elmendaro township, lost 1 2-year-old heifer.
Allowed..... 20 00

65. H. R. Scoggins, Hartford, lost 51 head—24 3-year-old steers, $30; 11 2-year-old steers, $20; 2 calves, $10.
Allowed..... 1,230 00

66. D. B. Stigner, Hartford, lost 1 fresh cow.
Allowed..... 25 00

67. W. A. Pease, Elmendaro township, lost 4 cattle—3 cows, $60; 1 yearling steer, $15.
Allowed..... 75 00

68. George Parker, Hartford, lost 1 cow.
Allowed..... 20 00

69. Peter Schlisher, Fremont township, lost 9 head—4 cows, $20; 1 yearling steer, $30; 1 2-year-old steer, $20; 1 yearling heifer, $10.
Allowed..... 185 00

70. John Schlisher, Fremont township, lost 1 cow.
Allowed..... 17 00

71. Marshall Meal, Hartford, lost 1 cow.
Allowed..... 20 00

72. J. N. Nurmburg, Center township, lost 1 Polled Angus cow.
Allowed..... 22 50

73. G. P. Jones, Center township, lost 14 head—10 cows, $20; 1 yearling heifer, $8; 1 2-year-old bull, $25; 2 calves, $7.
Allowed..... 247 00

74. Theodore Hurtig, Hartford, lost 1 cow.
Allowed..... 20 00

75. G. O. Hughes, Center township, lost 4 head—3 cows, $20; 1 3-year-old steer, $25.00
Allowed..... 85 00

76. W. T. Hite, Elmendaro township, lost 4 head—4 cows, $20.
Allowed..... 80 00

143 77. W. H. Hickox, Center township, lost 1 cow.
——..... 15 00

78. James Hutton, Elmendaro township, lost 1 cow.
Allowed..... 20 00

79. John W. Hughes, Jackson township, 2 yearling steers, $15; 1 yearling heifer, $8; 2 2-year-old steers, $25; 2 3-year-old steer-, $30.00.
Allowed..... 148 00

80. J. W. Hock, Elmendaro township, lost 1 yearling cow, $20; 1 2-year-old heifer, $12; 1 yearling heifer, $8; 1 yearling steer, $15.
Allowed..... 55 00

81. John Hock, Elmendaro township, lost 20 head—7 2-year-old steers, $157; 4 1-year-old steers, $60; 6 2-year-old heifers, $36.00.
Allowed 391 00

82. D. H. Gard, Elmendaro township, lost 4 cattle—3 cows, $60; 1 heifer, $7.
Allowed 67 00

83. E. Fullen, Hartford, lost 1 milk cow.
Allowed 25 00

84. George Elliott, Elmendaro township, lost 2 head—2 cows.
Allowed 40 00

85. R. M. Elliott, Emporia township, lost 7 head—3 cows, $20; 4 yearling steers, $17.
Allowed 128 00

86. J. L. Stratton lost 3 head—3-year-old steers, $30.
Allowed 90 00

87. Lawrence Dresher, Elmendaro township, lost 5 head—3 2-year-old steers, $60; 2 cows, $40.
Allowed 106 00

88. Elizabeth Davis, Emporia township, lost 4 head—3 cows, $60, and 1 calf, $5.00.
Allowed 65 00

89. J. C. Cooley, Hartford, lost 1 cow, $16.
Allowed 16 00

90. G. T. Collins, Hartford, lost 1 cow.
Allowed 23 00

91. G. C. Bender, Elmendaro township, lost 2 cows.
Allowed 40 00

92. John Bricker, Elmendaro township, lost 1 dry cow.
Allowed 15 00

93. V. G. Baysinger, Elmendaro township, lost 2 cows.
Allowed 36 00

94. Winnie Baysinger, Elmendaro township, lost 1 bull.
Allowed 21 00

95. D. S. Baysinger, Hartford, lost 1 cow.
Allowed 22 00

96. C. N. Buck, Jackson township, lost 4 cattle—3 cows, $60; 1 bull, $25.
Allowed 85 00

97. S. C. Bixler, Hartford, lost 1 cow.
Allowed 18 00

98. Herman Brier, Center township, lost 7 cattle—3 cows, $23; 2 cows, $17; 2 yearling heifers, $9.
Allowed 123 00

99. John Brier, Center township, lost 3 cows—2, $40; 1, $25.
Allowed 65 00

100. Adolph Brier, Center township, lost 1 cow.
Allowed 20 00

101. W. B. Johns, Center township, lost 4 head—1 heifer, 2-year-old, $12; 1 2-year-old steer, $15; 2 steer calves, $16.
Allowed 43 00

102. Mary Westfall, Center township, lost 4 head—2 cows, $45; 1 2-year-old steer, $26; 1 calf, $8.00.
Allowed 79 00

103. Alice Stenberger, Elmendaro township, lost 5 head—1 cow, $25; 3 cows, $20, and 1 yearling, $10.
Allowed 95 00

104. Amanda J. Jones, Elmendaro township, lost 5 head—2 cows, $48; 2 2-year-old heifers, $24; 1 yearling heifer, $10.
Allowed 82 00

105. Mrs. V. J. Hale, Olpe, lost 1 cow.
Allowed 18 00

106. Mary Conway, Center township, lost 4 head—3 cows, $72; 1 heifer, $12.
Allowed 84 00

107. John Patch, Center township, lost 41 head—2 cows, $240; 6 yearling heifers, $48; 7 yearling steers, $105; 5 3-year-old steers, $150; 1 bull, $27; 10 2-year-old steers, $200.00.
Allowed 770 00

108. John H. Ferren, Center township, lost 2 head cows.
Allowed 35 00

109. Wm. Nicholas, Pike township, lost 2 head—1 cow, $20; 1 heifer, $10.
Allowed 30 00

110. Jane Jones, Center township, lost 28 head—14 milk cows, $23; 3 milk cows, $27; 2 2-year-old heifers, $15; 2 yearling steers, $15; 3 2-year-old steers, $25; 2 yearling heifers, $12; 5 calves, $5.00.
Allowed 518 00

111. H. R. Williams, Emporia township, lost 1 steer.
Allowed 20 00

112. G. W. Lewis, Emporia township, lost 14 head—1 Holstein cow, $30; 12 cows, $20; 1 bull, $30.
Allowed 300 00

113. J. W. Ketcham, Elmendaro township, lost 38 head. Allowed 27 head—9 cows, $20; 8 2-year-old heifers, $12; 5 yearling heifers, $8; 5 yearling steers, $15.
Allowed 391 00

114. H. A. Taylor, Matfield Green, Chase county, lost 1 1-year-old steer.
Allowed 12 00

115. Timothy Murphy, Chase county, lost 1 cow.
Allowed 20 00

116. David McKee, Chase county, lost 1 2-year-old heifer, $12; 1 2-year-old steer, $20.
Allowed 32 00

117. Robert North, Chase county, 3 cows, $20.00.
Allowed 60 00

118. Wesley Roberts, Chase county, lost 3 head—1 cow, $20; 2 2-year-old heifers, $24.
Allowed 44 00

119. George Ward, Chase county, lost 11 head—3 cows, $18; 3 yearling steers, $15; 3 2-year-old steers, $20.
Allowed 189 00

145 120. L. Y. Cooper, Elmendaro township, lost 10 head—5 4-year-old steers, $200; 2 3-year-old steers, $60; 2 2-year-old steer-, $40; 1 cow, $20; contingent damage on 18 shipped, $53.50.
Allowed 373 50

121. Hannah Bowers, Center township, lost 9 head—1 yearling steer, $15; 3 cows, $20; 2 cows, $20; 3 heifers, $12.
Allowed 151 00

121½. We allow to Herman Bros. for 1 cow and *1 three* 1 three-year-old $20 and $16 respectively..... 36 00

123. P. Montgomery, account Lyon and Campbell, lost 77 head—77 3 and 4 — old steers, $27.30.
Allowed 2,102 10
Contingent damage on 123 head of cattle shipped affected with Spanish fever and reduced in value thereby, $11.48..... 1,402 04

123. P. Montgomery, account of J. W. Montgomery, lost 40 head—40 3 and 4 year old steers, $39.81.
Allowed 1,592 40
Contingent damages on 77 head of cattle affected with Spanish fever and reduced in value thereby, $9.00 per head 1,463 00

124. Farrington and Lantry lost 206 head of 4 and 5 year old steers, $45.80.
Allowed 9,434 80
Contingent damages on 662 head of cattle affected with Spanish fever and reduced in value thereby, $14.94 per head 9,890 28

125. A. T. Johnson, Matfield Green, Chase county, 1 milk cow, $20.00.
Allowed 20 00

126. Alfred Marley, Elmendaro township, lost two cows.
Allowed 40 00

127. Anna Hughes, Emporia township, lost 1 2-year-old heifer, 1 yearling heifer, 2 2-year-old steers, 2 3-year-old steers, and one bull.
Allowed 135 00

128. Charles Haber, Elmendaro township, lost 54 head.
Allowed 1,173 00

129. Mrs. Martha Smith, lost 2 cows.
Allowed 40 00

130. W. C. Phillips, Neosho Rapids, lost 1 cow.
Allowed 20 00

131. Phillip Davis, Neosho Rapids, lost 5 head.
Allowed for three head..... 60 00

132. John Maddox, Emporia township, lost 1 head, 4-year-old steer, 1,400 lbs.; value, $52.
Allowed..... 30 00

133. Owen Hughes, Emporia township, lost 3 head; value, $60.
Allowed..... 60 00

1. J. J. Rumford, Center township, lost 1 cow; claim not allowed.

2. E. W. Everett, Olpe, lost 1 cow; claim not allowed.

3. L. R. Wright, for Eureka Springs Stock Company; papers submitted.

4. A. B. Holforty, Jackson township, lost 1 yearling heifer; claim not allowed.

5. L. H. Ames, Jackson township, lost 1 cow; claim not allowed.

6. Those of J. W. Ketcham, Elmendaro township, dying in October and November not allowed without further proof; must have been neglect in caring for the same; evidence submitted to the court.

7. S. F. Jones, Kansas City, Mo., lost 29 head; only 29 died; 3 and 4 and 5 year old Texas cattle, valued at $17 per head; not sufficient evidence that these cattle died of fever (2,700 head exposed).

146 8. Wm. Dunlap, Chase county, lost 31 head, thin Arizona cows; value, $7 per head; not sufficient evidence that they died of fever.

9. F. M. Nine, Neosho Rapids, lost 5 head—2 cows valued at $40.00; 1 cow, $15.00; 2 heifers, $24.00; not sufficient evidence that these cattle were exposed to the trail. We assess loss 5 head, $88.00, and submit papers.

10. L. O. Olson, Neosho Rapids, lost 29 head; not sufficient evidence that these cattle were on the trail, and that cattle were driven across the trail after the quarantine; papers submitted to the court; assess value of 29 head at $530.00.

We find *that* $1.50 per head an average cost of burial. We have submitted some affidavits to the court where we could get *on* evidence further as to the loss sustained and where there seemed to be a negligence in keeping their cattle out of the infected district. The grass fine on these quarantine grounds, and the temptation to let cattle graze is infectious.

The several affidavits last referred to consist of the affidavit of Wright Bros., by L. R. Wright; affidavit of O. L Olson; affidavit of J. W. Osborn, for Carson and Osborn; affidavit of Hugh C. Jackson, for himself; affidavit of F. M. Nine; affidavit of T. E. Welch; affidavit of Henry Giger; affidavit of J. W. Ketcham *et al.* concerning Ketcham's claim; affidavit of Phillip Davis and Frank Barbyshire. These several claims, to the extent that the same are not passed upon, the referees declined to pass upon them, and have made en-

dorsements upon some of them and here submit them to the court to decide whether, upon the facts as set out, the claimants have a legal claim. We procured the services of the stenographer of Buck and Bruce and recommend that they be paid therefor $35.00. We were actually occupied seven days and charge $5.00 each per day and expenses.

Making for T. B. Wibley.....	$35 00
" " John Minnich..	54 25

Including 5 R. R. fares, $5.25; 7 days' board, $14.

Making for Wm. Rogers as follows:

3 R. R. fares to Emporia and return	$20 10
7 days' board.....	14 00
7 days' services.....	35 00
	$69 10

WM. A. ROGERS,
T. G. WIBLEY,
J. D. MINNICK, *Referees.*

Supplemental Report.

The undersigned, two of said commissioners, here report that all of the foregoing report was satisfactory to W. A. Rogers, except that he desires to take therefrom page 2 thereof and to insert in lieu thereof the following:

"Next morning at Olpe, in said Lyon county, and did so meet pursuant to adjournment, and investigated the claims of between forty and fifty at and near that place, and then adjourned to meet on the 26th of January at Emporia, where we continued our investigation, and have been engaged at different times. Each time before resuming labor we announced in the papers of our proposed taking up and considering the evidence."

We find from the evidence which we have taken that the following parties lost cattle which had become disease- and suffered to some extent in other ways as we have found.

"The following is a list of such parties as have suffered loss from said disease and other causes, to wit:"

147 The undersigned do not consent to any such change and reaffirm and adopt the report as originally prepared and as found above.

We further find there has been omitted from this report a damage which was allowed to Wright Brothers for fence. This herd of Texas cattle were driven across Wright Brothers' pasture, and they, to prevent further spread of the disease to the herd of cattle in that pasture, built a fence fencing off the trail, for which they are entitled to recover the sum of $87.00. This claim was agreed upon by all of the commissioners.

We further find the several amounts inserted in ink with explanations which we inadvertently omitted from the report as first

prepared, and which we now have inserted since the signature of Mr. Rogers was appended.

J. D. MINNICK,
T. G. WIBLEY, *Referees.*

Plaintiff offered in evidence stipulation and the report of the commissioners. It was considered in evidence, marked Exhibit "W."

S. F. JONES was examined and testified as follows:

Defendant railroad company objected to the testimony about to be offered as incompetent, irrelevant, and immaterial, and for the reason that there was a misjoinder and excess of parties defendant claiming affirmative relief from defendant railroad company, and because the jury was incompetent to try and determine more than one case at a time. The objection was overruled; to which defendant railroad company excepted.

Q. You reside in Chase county?

A. Yes; until right recently.

Q. How many head of cattle did you lose from this Texas fever—what we have been commonly supposing to be Texas fever—last year?

A. We brought in a claim for twenty-nine head. We lost some more and had some other damage from it, but that is all we brought in.

Q. Now, these cattle of yours, in what portion of Chase county or what pasture were they located in and contiguous to what cattle?

A. Well, sir, they were near, in fact just across the fence—a pasture fence between them and this pasture that is known as the Brogan pasture, where these cattle died so. Ours was south of it, adjoining that pasture.

Q. Did you know of any of the Hozier cattle getting over into your pasture?

A. Yes, sir.

Q. Did you notice any ticks upon these cattle of yours that died?

A. No, sir.

Q. Did you observe very closely as to that?

A. No; I don't think I did. I don't recollect of looking for ticks. If there had been many there, though, I would have seen them, for I examined them pretty close.

Q. Were they exposed to these cattle that brought in the infection?

A. Yes, sir.

Q. Now, do you know what those cattle were reasonably worth per head—the market value?

A. I think I do, sir.

Q. What were they worth per head?

148 A. Worth about twenty dollars a head. The balance of the herd sold for that, but in order to make these come in shape, so I thought that nobody would think that I was overcharging, we agreed to put it at $17.50.

Q. Now, what was the condition of the cattle before they became infected, with reference to being in good health and condition?
A. Yes; them cattle was considered to be in excellent health.

WILLIAM DUNLAP was examined by Mr. Madden and testified as follows:

Defendant railroad company objected to the introduction of any testimony on the part of this witness as being incompetent, irrelevant, and immaterial, and for the reason that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant railroad company, and because the jury is incompetent to try more than one case at a time. The objection was overruled by the court; to which defendant railroad company excepted.

Q. State where you reside.
A. In Chase county.
Q. I will ask you whether you lost any cattle in the summer of last year from what is commonly known as Texas fever.
A. I lost some; yes.
Q. How many head?
A. Twenty-one head.
Q. What class of cattle were they?
A. Arizona cows.
Q. What was their condition of health and flesh previous to becoming infected?
A. Well, they were rather thin in flesh, but they were healthy and all sold in Kansas City.
Q. Were these cattle kept contiguous to the Hozier cattle?
A. Yes; joined the pasture on the north.
Q. Do you know what the fact is as to some of the Hozier cattle breaking out and getting into the pasture where your cows were?
A. Yes; there was; and some of the cows got into the other pasture also.
Q. Now, do you know what the reasonable market value of those cows was at the time of their death?
A. Yes; I do.
Q. What was it?
A. They netted me about eight dollars a head in Kansas City, the balance of them. I paid seven dollars a head for them.
Q. Did you make any observations with reference to the symptoms of those cattle?
A. Yes, sir.
Q. What were the symptoms?
A. Well, I took Mr. Evans up there as soon as I heard the cows were dying, the next day after they commenced dying. We also went over Farrington's cattle the same day and looked at those. They acted the same.
Q. Something similar?
A. Yes, sir.
Q. How did they act?

A. They were drooping; their ears drooped and they looked sluggish and were sick.

Q. Did you notice the symptoms of those cattle of Mr. Jones that were *were* sick and died?

A. Yes, sir.

Q. What were those symptoms with reference to being similar to those of the Farrington cattle and yours?

A. They were similar. We went through the whole bunch, the three bunches, that day.

Q. Did you observe ticks upon any of those cattle?

A. No; I did not.

Q. Did you make any observations?

A. No; I didn't know whether there would be any ticks on the sick cattle I didn't know they would have ticks at that time.

149 Mr. FARRINGTON was here recalled by plaintiff for further examination, and the defendant railway company made the same objection as was made to deposition of defendant Baysinger:

Q. Mr. Farrington, you are a member of the firm of Farrington and Lantry that suffered loss in this case?

A. Yes, sir.

Q. How many cattle did you have altogether in the Brogan pasture?

A. 868.

Q. What class of cattle?

Defendant railroad company objected to the question.

Q. What were the symptoms, if you made any observations as to the symptoms of the cattle that died or sickened belonging to you?

A. I observed a great many of them that were sick. They would stand with their heads down and ears drooped forward; seemed to be in a bad condition; they would wabble around a good deal, slobber at the mouth, and stagger as they walked.

Q. What, if any, observations did you make as to there being any ticks upon those cattle that died or that were affected?

A. I never noticed any ticks on the dead ones, but I did on the sick ones that was alive.

Q. Now, did you ever see these Hozier cattle?

A. Yes, sir.

Q. What is the fact as to the Hozier cattle being turned in to the same pasture with yours or their getting together?

A. I don't know that they were turned in, but they were together; there was something like sixty head to a hundred head of them in with our cattle and about two hundred and odd head of ours allowed to get in with theirs.

Q. That broke through?

A. Yes, sir.

Q. Now, what was the kind or character of cattle that we have been calling the Hozier cattle with reference to being domestic or Texas cattle?

A. Well, they were Texas-appearing cattle.

Q. What was their appearance as to being wild and undomesticated?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was overruled; to which defendant railroad company excepted.

A. Well, they were like range cattle; they would run at—especially at a man afoot or in a buggy or horseback.

Q. You know what I mean, what is the fact as to their being wild, undomesticated?

A. They were wild cattle; what we term wild range cattle.

Q. Did you make any observation as to the horns of the cattle being short or long?

Defendant railroad company objected to the question. The objection was sustained by the court; to which plaintiff excepted.

Q. Now, what is the fact as to those cattle ranging through that country, breaking into pastures and the like of that; these wild cattle?

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial. The objection was sustained; to which plaintiff excepted.

Q. Did you make any observations as to the nature of the cattle in the way of roaming and ranging on the ranch down in Texas while you were there and their ability to roam from one place to another?

A. Well, I don't know; I suppose they were like the cattle on ranges; would go wherever they wanted to.

Q. What are the habits of those cattle in reference to ranging?

A. Well, they are apt to range in a hundred miles square where they are not confined.

150 Q. Now, you spoke in your testimony yesterday about Independence creek being something near the north line of this range, in Pecos county. I will ask you what is the fact as to the ability of those cattle in ranging, as you speak of, passing over the Pecos river, if you made any observations in regard to that, in regard to the fords over the Pecos river into Crockett or into Valverde county.

Defendant railroad company objected to the question for the reason that the same thing had been gone over once.

By the COURT: I think he went over that yesterday.

Q. Now, what were the opportunities for large bodies of cattle, or any number, to get water in these streams without ranging long distances?

A. Well, in the sixty-five miles that I drove I didn't see any water until we got to this point, the headquarters of Independence creek; from there to the river and in the river. Of course, the cattle would range up and down the Pecos river, as that was the only water there was.

Q. How was that Independence creek with reference to being a stream of any size or having any great quantity of water?

A. Well, it was from thirty to fifty feet wide. I don't know the depth. It ran down through the center of a cañon. The cañon was from half a mile to a mile wide. It varied along.

Q. If this stream, Independence creek, was on the north of the ranch, how far south would you say the ranch extended from that?

A. Well, I was only told that it extended about forty miles each way.

Q. Forty miles each way?

A. Forty miles square up and down the river.

Q. Now, from what you understood as the Hozier ranch, what would be the opportunities for cattle ranging in the southern part of the ranch or range, or south of it, to get water at any other place than along the Pecos river in Valverde county?

A. I was not in Valverde county only as I crossed it on the railroad. Of course, I don't know what water there is there.

Q. Did you find any streams of any kind upon the range except Independence creek and Pecos river?

A. That is all, and I rode sixty-five miles over that country. That is all I know of. I was not told; I inquired about it.

Defendant railroad company objected to his stating what he was told.

Q. You need not state what you heard.

Cross-examination by Mr. SEDGWICK:

Q. You are acquainted with the western part of this State, are you not?

A. Yes; I have been over it.

Q. And also with the Panhandle portion of Texas?

A. Yes, sir.

Q. Better acquainted with that portion of the country than you are with the country from which these cattle came?

A. Yes; I have been there oftener. I never was down there but once.

Q. Isn't it a fact that cattle running all over the western ranges are inclined to travel and to roam?

A. Yes; and where *where* they are not confined by fences.

Q. And isn't it a fact that a herd of cattle brought from the Panhandle or from western Kansas and taken into Chase county would roam just the same as these particular cattle you are speaking of?

A. Yes; if they wasn't confined.

Q. Does the mere fact that cattle do roam over the country in that section of the country indicate that they were wild and undomesticated cattle any more than if from western Kansas?

A. No; I guess not.

151 Q. It just simply indicates that they have been range cattle?

A. That's the way I understand it.

Q. And all this country in the Panhandle is given to range cattle, isn't it—cattle range all over it?

A. Pretty generally so; yes.

Redirect examination by Judge BUCK:

Q. Then I understand you to say, from your experience as a cattleman, that a large bunch of cattle on a range will naturally stray and wander off if no fences control them or nobody is herding th-m?

A. Yes, sir.

Q. And go off a good many miles?

A. Yes.

Q. What was this country that you drove through from Dryden, on the Southern Pacific road, until you struck the Hozier ranch on Independence creek, a prairie country?

A. Yes; no fences of any sort.

Q. What were the oppor-unities of grazing, pretty slim or pretty fair?

A. It looked to me like it was pretty slim down there.

Q. Some section- in that country had not had a range since '89 to amount to anything, had they?

A. I was told they had not.

Redirect examination by Mr. MADDEN:

Q. Isn't there a marked difference in the character and appearance of cattle raised in western Kansas and those raised in Pecos or Valverde counties, in Texas?

A. Yes, sir.

Q. What would be the difference?

A. The cattle that are in the Panhandle in Texas or in western Kansas are more domestic looking; they are larger framed and probably better-bred cattle. Those in the southern country seem to grow slender, light-boned. Even if they are well bred they grow that way.

T. C. WIBLEY was examined and testified as follows:

Q. You live here in town?

A. Yes, sir.

Q. And for a great many years have dealt in cattle?

A. Why, for quite a number of years.

Q. And you are one of the commissioners or referees in this cattle case to estimate the damages?

A. Yes, sir.

Q. I will ask you to look at one thing in this report (indicating) and ask you if you personally know the facts on which that allowance was made.

A. I do.

Q. What was that? Do you know the cattle?

A. Yes; they were brought in here for sale and driven to the

Stratton pasture over this Texas trail. After they were there probably two months the cattle got sick and commenced dying, and I was down there and I saw Mr. Cross; he was kind of acting as agent for them. He said the best thing we could do would be to ship them. I went do-n and selected all that I thought would do to ship, and we sold them in Kansas City as exposed cattle and got the best price we could for them.

Q. This was a loss you knew existed?

A. Yes. Does it just state the loss on the 23 head?

Q. Yes; just the 23 head.

A. Yes; $592.00.

Q. Now, $115 is all I am asking you about.

A. Yes.

Q. That was occasioned within your own knowledge?

A. Yes; I took away the cattle and sold them and was with them when they were sold.

W. J. BROGAN was examined by Judge Cunningham and testified as follows:

Q. What relation are you to Francis Brogan?

A. I am his son.

152 Q. Do you know Mr. Williams, connected with the M., K. and T. railroad?

A. Yes, sir.

Q. What is his connection with the road?

A. I believe his title is traveling freight agent. He is connected with the freight department.

Q. Did you see him about the 10th or 11th of April last year?

A. In '92?

Q. Yes.

A. Yes, sir.

Q. Where?

A. In the depot at Hartford.

Q. Did you hear any conversation between him and your father relative to some arrangement which was being made about the shipment of Hozier Brothers' cattle from Texas?

A. Yes, sir.

Q. You may state what that was.

Defendant railroad company objected to the question as incompetent, irrelevant, and immaterial, and because it had not been shown that Williams had any authority to bind the company. The objection was overruled by the court; to which defendant railroad company excepted.

Q. State what the conversation was that occurred between your father and Mr. Williams.

A. Mr. Williams made an agreement with him that he would pay—that is, that the company——

Defendant railroad company objected to the statement of the witness.

Q. He said that the M., K. and T. would pay father all the expenses he incurred in driving those cattle from Hartford to the ranch on the Verdigris.

Q. What is known as the Brogan ranch, in Chase county?

A. Yes, sir.

Q. What was your father to do, if anything, in consideration of that promise?

A. Why, he was to do what he could to influence Hozier's to ship cattle over the M., K. and T.

Q. Do you know what he did, as a matter of fact; do you know of any telegraphing that was done that day?

A. Yes; there was quite a lot of telegraphing done.

Q. Who did it?

A. I wrote a number of the telegrams myself at Mr. Taylor's, and I think Mr. Williams', dictation.

Q. Who sent the telegrams?

A. The agent at Hartford—the M., K. and T. agent.

Q. Do you remember what day it was?

A. No; I don't remember the exact date. It was in April some time.

Q. Do you know what day of the week it was?

A. No; I don't remember.

Cross-examination:

Q. Who did the telegraphing, the agent?

A. Yes, sir.

Q. Did Mr. Williams do any of it?

A. I don't remember that he did.

Q. You were there all the time?

A. Yes, sir.

Q. How many telegrams were sent by Mr. Williams, or did he send any?

A. Well, there were quite a number sent. I couldn't remember.

Q. Were any replies obtained?

A. Yes; several replies obtained.

Q. Do you remember whether or not Mr. Williams sent a telegram to Mr. Donahue?

A. Yes; I know Mr. Williams sent at least one, and I think two or three, to Mr. Donahue.

Q. Do you remember whether there was an answer obtained from Mr. Donahue to any of those telegrams?

A. Yes; I think there was.

Q. Do you know what was the substance of the answer?

153 A. That he had seen Hozier and secured the shipment, or would see him at once and secure it, or both. I think both came.

Redirect examination:

Q. Who was present at that time besides yourself and your father?

A. Mr. Taylor and Mr. Williams and the agent.

Q. At the time the telegraphing was done, I mean; who were appearing there and purporting to act on the part of the company?
A. Mr. Williams.
Q. Which Taylor was it?
A. Capt. I. A. Taylor.
Q. Was he taking any hand in it?
A. Why, he was, to a certain extent.
Q. Where did this conversation between your father and Mr. Williams take place?
A. Right in the office there.
Q. Do you remember whether or not Williams did any of the telegraphing?
A. I rather think he did, but I would not say positively.
Q. The telegrams that were sent, were they known to him?
A. Every telegram that was sent and received was read by myself and Captain Taylor, or all three of us.

Recross-examination:

Q. That was after your father had made a contract with Mr. Hozier, wasn't it?
A. For the pasturage; yes.

Plaintiff here rested his case with the understanding that he should put one or two more witnesses upon the stand when they arrived.

Defendant railroad company moved the court to withdraw from the jury and instruct them to disregard all the testimony introduced on behalf of all the claimants known in the case as codefendants, except the testimony in behalf of the claimant Charles Haber, for the reason that it was incompetent, irrelevant, and immaterial, and that there was an improper joinder of defendants as claimants. The motion was overruled by the court; to which defendant railroad company excepted.

Defendant railroad company demurred to the evidence introduced by the plaintiff upon the ground that the evidence wholly failed to disclose any cause of action or ground of relief in favor of the plaintiff or in favor of any of the defendants claiming affirmative relief against defendant railway Co., and because of said misjoinder and excess of parties no judgment could be rendered.

The demurrer was overruled by the court; to which defendant railroad company excepted.

Defendant railroad company then introduced the following testimony:

E. A. HOZIER was recalled for further cross-examination by defendant company:

Q. You may state how many men you had accompany these cattle on the trip from Midland, Texas, to Hartford, Kansas.
A. There was two men with each train.
Q. Do you know how many trains there were?
A. I believe there were five.

Q. Then ten of your employees accompanied the cattle?
A. Yes; about that many.
Q. For what purpose did they accompany the cattle?
A. To keep the cattle from getting down in the cars, and to attend to them on the way up.
Q. Care for them?
A. Yes; care for them.

154 *Q.* C. P. RECTOR was examined by Mr. Sedgwick and testified as follows:

Q. Where do you reside?
A. In Memphis, Tennessee.
Q. Where did you reside in April, May, and June, '92?
A. Parsons, Kansas.
Q. What were you doing at that time?
A. I was general freight and ticket agent of Kansas and the Indian Territory of the M., K. and T. road.
Q. Do you know George B. Hozier?
A. Yes, sir.
Q. Do you know E. A. Hozier?
A. Yes.
A. Yes.
Q. The gentleman who just left the stand?
A. Yes.
Q. How long have you known this gentleman?
A. Oh, for a year or such a matter, I guess.
Q. I will ask you if you had any business relations with them early in April, '92; and, if so, state fully what they were.
A. I couldn't say positively whether it was in April or not; along about that time, though Mr. E. A. Hozier asked me for a rate on some cattle from Midland, Texas, to Hartford.
Q. To Hartford, Kansas?
A. Yes.
Q. You may state wh-ther you gave him a rate and what he said in relation to the rate you gave him.
A. I made him a rate which seemed to be satisfactory.
Q. State what he said.

Plaintiff objected to the question. The objection was overruled; to which plaintiff excepted.

A. I have no knowledge of anything particular said; only he asked me for the rate and I gave it to him.
Q. Well, did he make any objection that it was too high or did he say it was satisfactory, or what did he say about it?
A. No; he didn't say it was too high. My understanding was that it was satisfactory.
Q. You are not allowed to state your understanding. State what Mr. Hozier said, if you can. If you can't recollect the exact language, give the substance of what he said.
A. I don't think I can remember what he said.

Q. Can you give the substance of what he said in relation to your giving him a rate?

A. Only that the rate was satisfactory.

Q. Now, Mr. Rector, are you acquainted with S. J. Williams?

A. Yes, sir.

Q. What position did S. J. Williams hold at that time in the employ of the Missouri, Kansas and Texas railway?

A. He was what we term traveling freight agent.

Q. I will ask you to state whether, by virtue of his position as traveling freight agent, he had any authority to make contracts in regard to the shipment of freight.

Plaintiff objected to the witness stating unless he knew what his authority was.

By the COURT: Let him state what his authority was, if he knows.

Q. Under whom was he working?

A. Under me.

Q. Now, you may state what authority Mr. Williams possessed by virtue of his office as traveling freight agent.

A. Well, he travelled over the territory under which I covered and solicited freight for the company. He would have authority to make contracts for freight at rates covered by the regular tariff.

Q. State what, if any, authority he had to make special contracts.

155 A. None whatever.

Q. State what, if any, authority he had to make contracts outside of the traffic business of the company.

A. None whatever.

Q. You heard Mr. Brogan's testimony as to a contract which he made with Mr. Williams, by which he was to be made whole for the driving of cattle from Hartford to Bazaar?

A. Yes, sir.

Q. State whether Mr. Williams, by virtue of his office, had any authority to make that contract with Mr. Brogan.

A. No, sir.

Q. State what, if any, knowledge you had that such a contract had been made or that Brogan claimed that such a contract had been made at the time of the shipment of the cattle.

A. When the matter came up I was in St. Louis. On coming home I understood that Captain Taylor had had some talk with Mr. Brogan at Hartford; Captain Taylor, fuel agent of the road. I immediately went to him and had some conversation with him about it, which developed the fact that he had had some talk with Brogan about these cattle being driven from Hartford over to Chase county.

Q. What authority had Taylor in the traffic business of the road?

A. None that I ever heard of or knew of.

Q. Under the organization of the company, by whom was the traffic business to be conducted?

A. By the traffic officials appointed for the purpose.

Q. Under whom were the traffic officials?

A. Under the general traffic manager.

Q. State whether Mr. Taylor was in that department of the road.

A. No, sir.

Q. What was the department in which Mr. Taylor was in the employ of the company?

A. It was the fuel department, under the general superintendent.

Q. Now, then, at the time of the shipment of the cattle did you understand that Williams had made any contract, or that Brogan claimed that Williams had made a contract, or was it your understanding that all that had been done had been done by Mr. Taylor?

A. That was my understanding.

Q. I will ask you from whom you got that understanding.

A. I think I got it from Mr. Taylor.

Q. You may state how you got that information from Mr. Taylor.

A. By a personal talk with him.

Q. Any other way than by a personal talk with him?

A. After my talk with Mr. Taylor, whose office was right under mine at Parsons, it was not but a short time till he wrote me a letter relative to the matter, which seemed to bother him, thinking he had done something outside of his authority.

Q. Do you remember the date of that letter, Mr. Rector?

A. I do not.

Q. I will ask you if you have in your possession or under your control the letter which you say you received from Mr. Taylor.

A. No, sir.

Q. I will ask you if you know where it is.

A. I do not. I think it was left in the records of the office at Parsons.

Q. When did you last see it and where?

A. In my office at Parsons.

Q. I will ask you if you have seen a copy of it since you have been in the court-room or since you have been in attendance at this court.

A. Yes, sir.

Q. I will ask you if that (indicating) is the letter you refer to.

156 A. (Examining the letter.) Yes, sir.

Q. Mr. Rector, in explanation of your evidence and also of your conduct in this case, you may read the letter, if you will.

Plaintiff objected to the witness reading the letter for the reason that it was not authenticated; that it was hearsay, and that the writer of the letter was dead. The objection was sustained by the court; to which defendant railroad company excepted.

Q. State what, if any, position Mr. Donahue held with respect to the company.

A. He was commercial agent at Kansas City.

Q. Under whom was he working?

A. For Kansas City proper business; he was under the general traffic manager.

Q. As to freight going into Kansas City this side of Kansas City or from the south—as to freight coming through Kansas and the Indian Territory towards Kansas City—you had charge of it?

A. Yes, sir.

Q. And to that extent had control of Mr. Donahue?

A. Those rates; yes.

Q. State what authority Mr. Donahue had by virtue of his relations to the company as its commercial agent.

A. To look after the business at Kansas City; to procure it.

Q. He could make contracts also to carry freights?

A. Yes.

Q. Had he any authority, so far as your jurisdiction was concerned, to vary the tariff rates without special permission to do so?

A. No, sir.

Q. You may state the rate which you gave Mr. Hozier when he applied to you for a rate for the shipment of those cattle.

A. My recollection *os* that it was $70 a car.

Q. You may state what the tariff rate was to Bazaar.

A. $75, I think.

Q. Why did you make him a rate of $70 when the tariff rate was $75 to Bazaar? Why did you make a rate of $70 to Hartford?

A. My information was that it was about a ten-mile further drive from Hartford tha*m* from Bazaar. It was to cover the expense, the shrinkage, &c., of that drive.

Q. Did you ever have any conversation or talk with Brogan about paying him for the drive?

A. No; I did not, gentlemen.

Q. Did you ever authorize either Williams or Taylor or anybody else to make a contract with Brogan to pay him for that drive across the country from Hartford to Bazaar?

A. No, sir.

Q. At the time you made the rate of $70 to Mr. Hozier what statements, if any, did Mr. Hozier make to you as to where the cattle were coming from—what section of the country they would be from—whether inside or outside of the quarantine line? I mean north or south or east or west.

A. They were to come from outside the quarantine line. In fact, they were to come from Midland. I knew that was outside.

Q. I will ask you if you know how far it is from Midland, Texas, to the west line of the quarantine line.

A. I do not.

Q. How far is Midland, Texas, west of Ft. Worth?

A. I couldn't tell you that distance without looking it up.

Q. About how far, do you know?

A. It is several hundred miles. I don't know the exact distance.

Q. Has the Missouri, Kansas and Texas Railway Company a line closer to Midland than Ft. Worth or railway connection closer than Ft. Worth?

A. No, sir.

Q. You may state, if you know, what railroad runs through
157 Midland Station, in Texas.

A. The Texas and Pacific.

Q. You may state whether or not any other railroad runs to that station.

A. No, sir.

Q. You may state where the Texas and Pacific crosses the Missouri, Kansas and Texas Railway of Texas.

A. At Fort Worth.

Q. Where does the defendant in this case connect with the Missouri, Kansas and Texas Railway Company of Texas?

A. At Denison.

Q. You may state who at that time was the general superintendent or manager of the Texas lines of the Missouri, Kansas and Texas Railway Company of Texas.

A. Mr. Maxwell, I believe.

Q. Had he anything to do with the control of the lines north of Denison?

A. No, sir.

Q. Who was manager or in control or chief executive of the lines north of Denison?

A. They were under Mr. Frey.

Q. How far is it from Denison to Ft. Worth?

A. About a hundred miles, I believe.

Q. You don't know how far it is from Ft. Worth to Midland?

A. No; I don't. The guides will show.

Q. After the cattle had arrived at Ft. Worth over the Texas and Pacific railway over what lines could those cattle have been transported north to the State of Kansas; or, in other words, what other lines besides the Missouri, Kansas and Texas Railway Company of Texas could have taken those cattle at Ft. Worth and transported them into the State of Kansas?

A. The Santa Fe could have taken them; the Texas and Pacific could have delivered them at their connections.

Q. What other connections had they at Ft. Worth besides the Missouri, Kansas and Texas of Texas and the Santa Fe?

A. They could have delivered them to the Iron Mountain or the Missouri Pacific.

Q. Which was the shortest and most direct route from Ft. Worth—over the Missouri, Kansas and Texas Railway Company of Texas or the Santa Fe or the Iron Mountain?

A. The M., K. and T. was some shorter.

Cross-examination by Judge BUCK:

Q. Mr. Hozier told you where the cattle were, down in Pecos county, Texas?

A. Yes, sir.

Q. Who was the president of the M., K. and T. at this time?

A. Mr. C. H. Cross, I think.

Q. Over what line of road did his presidency extend?

A. I guess over the whole system.
Q. Explain what that system was.
A. That would be its lines in Missouri, Kansas, Indian Territory, and Texas.
Q. Extending from Denison south to Ft. Worth and down to Lockhart and over to San Marquis and east towards Houston?
A. That was my understanding.
Q. Who was the general superintendent of the road?
A. Mr. J. J. Frey at that time.
Q. Who was its general auditor?
A. Mr. George J. Pollock.
Q. Where was his office?
A. At Parsons.
Q. And you were general freight agent?
A. Yes; for Kansas and for Indian Territory; general freight and ticket agent.
Q. The reports from Texas came into this general auditor at Parsons?
158 A. The Texas reports, I think, went into an auditor for Texas.
Q. But who supervised it? — was the ultimate manager of settling accounts as an auditor for your road? Did you have one that ranked all others, or were there several of equal authority?
A. The auditor for Texas would have charge of the Texas accounts.
Q. In making a shipment from Parsons to Ft. Worth would you rebill at Denison?
A. No, sir.
Q. In shipping down clear to Lockhart would you rebill at Denison?
A. No; and a good many other points not on our line; we have systems of through billing.
Q. Ordinarily in a shipment from one road to another it is rebilled?
A. No; I couldn't say that it was. I think the rule is now that they are generally billed through.
Q. You don't rebill at Ft. Worth when receiving goods from the Texas and Pacific?
A. No; they are billed through.
Q. Suppose, as general freight agent, you were down at Midland and were going to make rates for some — to ship from Parsons there, you could, could you, if you had been down there and struck a man that wanted to patronize you?
A. That would have been taken care of by the general freight agent for the State of Texas.
Q. If the goods were started from Parsons to Midland, even though you had made all the arrangements there, you would expect a shipper's bill made out at Parsons, where the stuff started from?
A. Yes.
Q. And it would be made on the usual forms that the road uses?
A. Yes, sir.

Q. Suppose you were striking a road with which you had no arrangements whatever and where they did rebill, the shipper's contract would be the same as set out in this answer here? You have seen it, haven't you?

A. I haven't looked at this particular one.

Q. This (indicating) has been termed a shipper's contract?

A. A stock contract.

Q. Yes; I am practically correct.

A. Yes, sir.

Q. Now, suppose your company owned the road at Midland, and reversing it and taking yourself from the M., K. and T. and getting onto the Texas and Pacific, and you were going to ship this very stock up into Kansas, and you had made no arrangement for a through shipment without rebilling, you would just use this kind of a blank as a railroad man, would you not?

A. Yes, sir.

Q. Now, I understand that these shipping contract- here pleaded show that the Texas and Pacific were to have tariff rates for the carriage of these cattle, and if you gave less than ordinary rates your road would stand the dimuniction and not that road? They would get all they were entitled to and you would have to take less?

A. I don't know that I exactly understand you.

Q. If you see the words "tariff rates" in the thing, that means the ordinary rates for that kind of shipment, doesn't it?

A. Yes, sir.

Q. You were making a figure to Mr. Hozier less than the tariff rate, and the M., K. and T. had to stand the shortage, didn't it, in that case if the Texas and Pacific shipped on tariff rates?

A. Yes, they would; if they were shipping——

Q. $70 was less than the tariff rate, wasn't it?

A. Yes; it was a special rate.

Q. They afterward shipped through Mr. Donahue at $65?

A. Yes, sir.

159 Redirect examination by Mr. SEDGWICK:

Q. You authorized the rate, did you?

A. No; I never did.

Q. Never authorized Donahue to make a contract for $65?

A. No, sir.

Recross-examination:

Q. He did make it at $65, didn't he?

A. Yes, sir.

JAMES DONAHUE was examined by Mr. Sedgwick and testified as follows:

Q. Where do you reside?

A. Kansas City, Missouri.

Q. What is your business?

A. General freight and passenger agent of the Kansas City, Pittsburg and Gulf at present.
Q. What was your business in '92?
A. Commercial agent of the M., K. and T.
Q. Where?
A. Kansas City.
Q. What territory did you have?
A. From Kansas City to Sioux City, Iowa.
Q. How far did you go the other way, towards St. Louis?
A. Went about as far as Independence; didn't go very far east.
Q. How far west did you go?
A. Went about Salina; not quite that far, I think.
Q. Did you have any of Nebraska?
A. Yes; Lincoln and Crete.
Q. Your territory didn't extend down into Kansas, south, did it?
A. No.
Q. When operating in Kansas or from south of Kansas City, Kansas, to whom did you report and under whom were you operating?
A. The Kansas City office generally reported to the general traffic manager.
Q. Who was the general traffic manager?
A. George Waldo.
Q. Who controlled the business south of Kansas City in Kansas?
A. Mr. Rector.
Q. The gentleman who just left the stand?
A. Yes, sir.
Q. You heard him state about making Hozier a rate on these cattle?
A. Yes, sir.
Q. Were you acquainted with Hoziers?
A. Yes, sir.
Q. How did you first learn of the fact that they were intending to ship cattle from Texas to Kansas?
A. Why, I think it was on a telegram got from Mr. Williams.
Q. Where was Mr. Williams at the time he sent that telegram?
A. At Hartford, I believe.
Q. Look at that telegram, Mr. Donahue (handing witness telegram). Do you recognize that as the telegram you got from Mr. Williams?
A. (Examining telegram.) Yes; I think that's the telegram.
Q. Did you answer that telegram?
A. Yes, sir.
Q. How long after?
A. I think the same day.
Q. You may look at that (indicating a telegram).
A. Yes; that's the answer.
Q. That is the answer to it, is it?
A. Yes—that is, as near as I can remember.
Q. Did you get any telegrams from other -ersons besides Mr. Williams that day from Hartford?

A. Why, I don't recollect of any.

Q. Now, at the time you got Mr. Williams' telegram, had you then seen Mr. Hozier?

A. No; not at that time.

Q. Did you know at that time of Mr. Rector's talk with Mr. Hozier over a rate?

A. No; I don't think I did.

Q. You knew nothing of that?

A. No, sir.

Q. How long after receiving Mr. Williams' telegram before you saw Hozier?

A. About as soon as I could get there.

Q. You are an expert, I suppose, in deciphering these marks
160 made by telegraph operators? What time was that sent?

A. 3.14 p. m.

Q. Now, what time would you say you received it?

A. Why, it would have to be repeated at Parsons. We might get it in, perhaps, fifteen minutes or maybe less if it was rushed right through. We had a wire right in our office in Kansas City from Parsons.

Q. Do you remember whether you answered that telegram that same afternoon?

A. It occurs to me I did, sir.

Q. You may state what took place between you and Mr. Hozier when you met him after receiving Mr. Williams' telegram.

A. After the receipt of the cattle I went to see Mr. Hozier about the 1,500 head of cattle to be shipped from Midland, Texas, to Kansas—Hartford, as I understood it—and ascertained what rate was necessary to secure the business as against the Santa Fe at Bazaar. Mr. Hozier represented that the pasture was about seven miles from Bazaar, and I think it was twenty miles from Hartford. Consequently, in order to get the business over our line, we would naturally have to make a less rate to Hartford than the rate to Bazaar, which, as near as I could understand at that time, — $75 for a standard car. We agreed on a rate of $65 for a standard car, and I think I telegraphed Mr. Williams that the shipment had been secured.

Q. That same day?

A. Yes, sir.

Defendant railroad company offered in evidence the telegram from Williams to Donahue and Donahue's answer thereto. The telegrams were read in evidence by Mr. Sedgwick.

Q. You may state, Mr. Donahue, how you knew that cars had been ordered.

A. Well, I presume that the cars may not have been ordered, possibly, when that telegram was sent, but Mr. Hozier would undoubtedly give me the information that the cars would be ordered for the shipment at Midland.

Q. Did you understand from Hozier at that time that he had ordered cars?

A. Well, the cars would be ordered at once. I may have sent the telegram before the cars had been ordered.

Q. Did you make any arrangement with Hozier by which the M., K. and T. was to furnish the cars?

A. Not that I know of.

Q. Could you have made any such agreement with him?

A. No; I could not. The cars would have to be ordered.

Q. Did the M., K. and T. Railway Company have any line running to Midland, Texas?

A. No, sir.

Q. Or anywhere near there?

A. No; no nearer than Ft. Worth.

Q. Did it have any stock yards there?

A. No, sir.

Q. Or agents?

A. No.

Q. Or cars?

A. Not that I know of.

Q. What did you tell Mr. Hozier in regard to cars—that is, from whom he should order cars?

A. I told Mr. Hozier cars would have to be ordered from the agent at Midland.

Q. And it was upon the strength of his statement to you either that he had ordered cars or would immediately order them that you put in the last part of the telegram that cars had been ordered?

A. Yes, sir.

Q. You may state what rate you made Mr. Hozier on these cattle, by whose authority you made it, and why you made it.

A. I made Mr. Hozier a rate of $65 per standard car from Midland, Texas, to Hartford, Kansas, and on the authority of the traffic department to beat competition.

Q. You had authority to make that contract?

A. Yes; we had a good deal of authority in that office.

161 Q. What, if any, contract or agreement did you make with Mr. Hozier in regard to paying anything to either himself or Mr. Brogan for driving the cattle across the country from Hartford to Bazaar?

A. None whatever.

Q. I will ask you again what you did not fully answer, why you made him a rate of $65 a car, which was $10 below the regular tariff rate to Bazaar.

A. Why, I thought I explained that to you, sir. The distance from Bazaar to this pasture was seven miles, as Hozier represented to me.

Q. Did he say that to you?

A. Yes; he said that to me, because I would not know it any other way, and the distance from Hartford to the pasture was, I think, twenty or over. I am not quite sure, but considerably longer. In order to overcome the difference in the distance we had to make a less rate to Hartford.

Q. Did you understand from any source that a rate below the tariff rate had been — by any other railroad company to Mr. Hozier in an effort to get the business?

A. I am not quite sure whether the $75 rate that I was figuring against that was made by the Santa Fe to Bazaar was tariff or less. Of course it was less than tariff.

Q. Did you figure against a rate below $75?

A. No; I did not; not that I recollect of.

Q. You didn't know of any rate that had been offered?

A. I don't remember anything about a less rate.

Q. This rate of $65 was made to cover the difference in the drive?

A. Practically so; it was to secure the business.

Q. At that time was there anything said about paying Brogan anything for driving across the country?

A. No, sir.

Q. Did Mr. Hozier notify you that he had a contract with Mr. Brogan for receiving the cattle at the station and taking care of them?

A. I don't know that he did.

Q. What was said between you and Mr. Hozier as to where these cattle were from? Did you make any inquiry of him as to where the cattle were from?

A. Except that he said they were from Midland; that was the station they were to be loaded at.

Q. Did you make any inquiry as to what part of Texas the cattle had been kept?

A. No; I don't think I did.

Q. Did you say anything to him about getting permits for the bringing in of the cattle?

A. Oh, that would have to be discussed, I presume; but I don't remember it now.

Q. Do you remember that you then knew where the Government quarantine line was?

A. We had maps in our office showing the lines.

Q. And do you remember whether the description of the place where Mr. Hozier said the cattle had been kept was inside or outside of the line, as you understood it?

A. As I understood it, Midland was outside of the quarantine line.

Q. You understood the cattle were at Midland?

A. Yes, sir.

Q. Do you know whether he did, in fact, get permits for the shipment of the cattle?

A. I couldn't say, sir; but I presume he did.

Cross-examination by Judge CUNNINGHAM:

Q. Do you say that Mr. Hozier told you that the cattle were being kept at Midland?

A. That was the station they were to be loaded at. No; I couldn't say that he said they were kept at Midland.

162 Q. Do you say he didn't tell you where they had been and were being kept?

A. No; I don't think he did.

Q. Would you be willing to trust your memory as against his statement in that matter?

A. Whatever statement Mr. Hozier makes I think would be pretty near true.

Q. So that you would rather take his statement now than your memory?

A. Yes; I would on that subject, because I don't recollect of anything being said.

Q. He may have told you all about it, and — is now out of your mind?

A. Yes.

Q. Did he tell you when he wanted to make that shipments?

A. Why, I don't know as he did, sir, except that I understood they were to be made at once.

Q. You know, as a matter of fact, don't you, that they were not made until the last of April or the first day of May?

A. I believe that is the case.

Q. How was it, then, that you were expecting cars to be ordered at once on the 11th of April to make these shipments when, as a matter of fact, they were not made until the first of May?

A. The cars may have been ordered and not supplied.

Q. What directions did you give Mr. Hozier about ordering cars?

A. That he would have to order from the agent at Midland.

Q. That's all he would have to do and let the agent at Midland know when he wanted cars?

A. Yes, sir.

Q. You didn't understand that Mr. Hozier was making any arrangement with the Texas and Pacific about bring- these cattle up, did you?

A. No, sir.

Q. You understood, when you closed the bargain with him at $65 a car from Midland to Hartford, that that ended the bargain?

A. Yes; as far as the rate was concerned.

Q. Well, so far as everything was concerned.

A. No.

Q. Except that he would have to notify the agent at Midland when to put in the cars?

A. He would have to notify the agent.

Q. It was all he had to do besides, wasn't it?

A. Besides the other things.

Q. The things that had been done?

A. Yes.

Q. He would simply have to let the agent at Midland, away down in the cactus plains, know when he wanted some cars sent in there in order to load his cattle? That's all he had to do?

A. No; he would have to find out that the cars were there before he drove the cattle from the range.

Q. He couldn't have loaded on the cars until the cars got there?

A. No, sir.

Q. Well, did you understand that the M., K. and T. were to send their cars down there?

A. I don't recollect about it.

Q. Wasn't that a fact?

Q. They way cars might have been furnished. The Texas and Pacific might have made application to the M., K. and T. for those cars, but the request for the cars would have to be put in to the agent at Midland by the shipper.

Q. Then the agent at Midland——

A. Would take it up with their superintendent or transportation or whoever had charge of their cars.

Q. Call on the M., K. and T. if necessary?

A. He might, possibly; yes.

Q. Now, at that time didn't you understand from Mr. Hozier that he had nothing to do with taking the cattle across the country to the ranch from Hartford?

163 A. No; I did not understand that. I don't think that was brought up between us.

Q. He was kind of working the distance racket on you in order to get a low rate?

A. Possibly.

Q. You understood, however, that those cattle were going over there for pasturage, I suppose?

A. Yes, sir.

Q. You said, in response to Mr. Sedgwick, that you supposed, of course, they would have to have a permit?

A. Yes.

Q. If you understood that those cattle were coming from a portion of the country that was not infected, why did you understand that they had to have a permit?

A. Well, I'll tell you, sir; Mr. Hozier would know as much about that as I would at that time, and knowing that he would know what would have to be done before the cattle could be moved, why, I would not pay very much attention to it.

Q. You were trusting Mr. Hozier to sort of go safe through this matter?

A. He would have to do it.

Q. You were trusting it to him?

A. He would have to do it. If he didn't do it, he couldn't move the cattle.

Q. But you were not assuming to look up the matter any yourself?

A. No; not me.

Q. You took no precautions at all, did you, Mr. Donahue, to ascertain the safety of these cattle?

A. Too far away, sir.

Q. You didn't undertake to do it?

A. No, sir.

Q. Now, you didn't have any special communication with your

traffic superiors in making this rate? You had authority to meet competition?

A. As a general thing.

Q. Didn't you in this particular case?

A. It looks like it.

Q. And you did?

A. Yes, sir.

Q. Did Mr. Hozier show you those telegrams that he had received from the seat of war, down in Hartford, at the time of the negotiations?

A. I don't remember, sir.

EXHIBIT 3.

From Hartford, 4, 11, 1892.

To Jas. Donahue, Kansas City:

Please see P. Montgomery No. 1625 Central St. at once, find out what point in Texas the 2,500 head of cattle for F. Brogan of Hartford are to be shipped from; also see Hosier and see if he will not give us the shipment Mr. Brogan asks that cattle be shipped to him here via our line. Wire me tonight.

S. G. WILLIAMS.

EXHIBIT 4.

From Kansas City, 4, 11, 12, 1892.

T. S. G. Williams, Hartford, Ks.:

Have arranged with Mr. Hosier for his fifteen hundred cattle from Midland to Hartford. Cars have been ordered.

JAS. DONAHUE.

Q. Didn't he say something to you about the matter having been fixed satisfactorily at Hartford?

A. No; I don't remember anything about that at all.

Q. Are you sure that you didn't see this telegram (indicating)?

A. (Examining telegram indicated.) I am not sure. I don't remember ever seeing it.

164 Q. You are not sure whether you saw it or not?

A. No, sir.

Q. Didn't he read this telegram to you?

A. He may have done so.

Q. You say he may — shown you this telegram. What did you understand by satisfactory arrangements had been made at Hartford?

A. I can't remember anything about it.

Q. They were *o*not making arrangements at Hartford about rates?

A. I didn't think they were, or else Mr. Williams would not have telegraphed me to secure the shipment.

The telegrams that were exhibited to the witness by Mr. Sedgwick were here offered in evidence and were marked respectively Defendants' Exhibit 3 and Defendants' Exhibit "4."

Redirect examination:

Q. I will ask you if you remember anything about arrangements for enlarging the stock yards there at Hartford for the purpose of receiving the cattle or any correspondence on that subject.
A. No; I don't remember.

C. J. WILLIAMS was examined by Mr. Sedgwick and testified as follows:

Q. Where do you reside?
A. My headquarters now are at Vinita, Indian Territory.
Q. Where did you reside in May and June, '92.
A. Parsons, Kansas.
Q. Are you in the employ of the Missouri, Kansas and Texas Railway Company?
A. I am.
Q. What is your position?
A. Traveling freight agent.
Q. What was your position in May and June of '92 and April, '92?
A. Traveling freight agent.
Q. Through what territory?
A. In '92, through Kansas and the Indian Territory.
Q. Who was your immediate superior?
A. Mr. C. P. Rector.
Q. I will ask you if you are acquainted with Francis Brogan.
A. I am.
Q. How long have you known him?
A. I don't know whether last April a year was the first I ever knew him or not. I think, though, it was.
Q. Where did you meet him?
A. At Hartford, Kansas.
Q. Who was present at that meeting?
A. Mr. I. A. Taylor, as I remember it, and our agent were the only ones in the office that I remember of.
Q. I will ask you if you remember on that occasion sending this telegram (indicating Defendants' Exhibit "3"), and you may state how you came to send it.
A. Yes; I remember sending that or having it sent. I wrote the message; I didn't send it.
Q. It seems to be signed by you?
A. Yes; I wrote the message and the agent there sent it.
Q. You mean he ticked it off on the wire?
A. Yes, sir.
Q. You may state how you came to send that message to Mr. Donahue.
A. When I got to Hartford that evening Mr. I. A. Taylor and

Mr. Brogan were there at the office, and they told me of these cattle that were to come in, and Mr. Taylor informed me that he had already made arrangements——

Q. I don't care about any arrangements that Mr. Taylor had made; I am getting at your acts. How did you come to send that telegram?

A. I asked Mr. Taylor if he had notified Mr. Donahue, as the arrangement was not positive that they could have the cattle, and have Mr. Donahue see Hozier Brothers and secure them of
165 Hozier Brothers. Brogan couldn't say whether they were to be shipped to Hartford or to Bazaar.

Q. What did Mr. Brogan say to you in regard to the point to which the cattle were to be shipped or might be shipped?

A. The only thing I remem-er being said about that was that it was seven miles, he claimed, or something near that. I don't know what the distance was, but it was nearer to Bazaar than it was to Hartford.

Q. You don't catch the meaning of my question exactly. What did Brogan say to you as to the contract he had with Hozier; did he say he had a contract with Hozier to take these cattle?

A. He said he had a contract to take the cattle, that he was to pasture the cattle, as I understood it at the time.

Q. Now, where did he say the cattle might be delivered?

A. Well, he had to take them, he said at the time, wherever Hozier Brothers said they were to be taken.

Q. Did he say any place had been agreed on between him and Hozier Brothers?

A. At that time he was trying, as I understood it, to get the cattle, or before this time, he wanted the cattle unloaded at Bazaar, as the drive was some shorter, and it seemed as though Hozier Brothers—some one had talked to them and the rate had been satisfactory so as that they would prefer that the cattle be unloaded at Hartford.

Q. Now, did you understand that by virtue of the contract between Brogan and Hoziers that Hozier could say that the cattle should be shipped to Bazaar, or to Madison, or to Hartford, or anywhere else?

A. I understood that, by the contract, from what I got from Brogan, that the cattle could be shipped wherever Hozier Brothers said, and that was the reason I sent the telegram to Mr. Donahue to see Hozier Brothers.

Q. And that Mr. Brogan was to take them at any point to which Hozier shipped them?

A. Yes, sir.

Q. From whom did you get that?

A. I got that from Mr. Brogan himself.

Q. On the day that the telegram was sent?

A. Yes.

Q. What time of day was it that you got to Hartford?

A. I got to Hartford near three o'clock. It was a few minutes before or after three o'clock that the train arrived.

Q. Did you make any contract with Mr. Brogan by which you

were to pay him for driving the cattle from Hartford across to Bazaar?

A. No; I did not.

Q. Was there any talk between you and Mr. Brogan in regard to the matter?

A. Mr. Brogan told me that he had——

Q. Was there any talk between you and him by which you agreed to do anything of the kind?

A. No; there was not.

Q. Was there any effort on Mr. Brogan's part to try to get you to make a contract of that kind?

A. No; there was not.

Cross-examination:

Q. Who were there, Mr. Williams?

A. As I remember it, Mr. Francis Brogan, our agent, Barberry——

Q. Is he now in the employ of the company?

A. I don't know; he was the last time I was up this way.

Q. Isn't he now station agent at Hartford?

A. I couldn't say positively.

Q. When did you see him there last?

A. Last July.

Q. You don't know of *b*his being discharged?

A. I do not.

166 Q. Who else?

A. I. A. Taylor.

Q. Didn't you see Will. Brogan there?

A. I don't remember of him being in the office.

Q. Was there anything said at all between you and Mr. Brogan about paying for driving these cattle across to his pasture?

A. Brogan to me?

Q. Either way?

A. No; there wasn't.

Q. Nothing said about it at all?

A. No, sir.

Q. Neither he to you nor you to him?

A. No, sir.

Q. Nothing that was like it at all?

A. No; there was nothing. That arrangement I had nothing to do with, and I couldn't have made the arrangement.

Q. Mr. Taylor was there?

A. Mr. Taylor was there.

Q. He did some telegraphing, didn't he?

A. Mr. Taylor, I think, did some telegraphing.

Q. Telegraphed to Hozier's?

A. Yes. Mr. Taylor, as I remember it now, telegraphed to Hozier, and that telegram was received in Kansas City at 11.10 a. m. the day I arrived at Hartford, at the main-line office at Kansas City, and I didn't arrive at Hartford until near three o'clock in the afternoon.

Q. How did you know of this?

A. I seen the telegrams is the way I know it.

Q. Was there anything said by Mr. Brogan in your presence about his receiving pay for driving the cattle across there?

A. That arrangement, whatever it was, was made with Mr. Taylor and Mr. Brogan. I don't think the pay was mentioned in my presence. That arrangement was made with some one else.

Q. Was there anything said as to extra trouble in driving them over there?

A. Yes; he claimed—no; there wasn't anything said about that.

Q. Nothing said about driving them over there at all?

A. He was to receive them at Hartford. The only thing that was said to me about receiving at Hartford was after his talk with Mr. Taylor. He was willing to receive the cattle at Hartford if we would put an incline in at our chute so that he could unload the cattle, and I agreed to take the matter up and see if it could be done

Q. How did you happen to come up there?

A. I got a message from I. A. Taylor.

Q. To what effect?

A. I don't remember just how the telegram read. I don't know whether the message said Hozier Brothers or F. Brogan. I think the message read from 2,500 to 3,500 head of cattle to ship from Texas to Kansas.

Q. Well, what else?

A. I don't remember whether the message had anything else in it or not.

Q. Simply the information that he had that many cattle to ship. Did he ask you to come up?

A. Yes, sir.

Q. When you came up there you found there had been some negotiations carried on between Taylor and Brogan about this matter?

A. Yes, sir.

Q. What did you ascertain those arrangements were, if anything?

A. I don't know that I inquired into that.

Q. Didn't you ascertain that arrangements had been made between Taylor and Brogan that Brogan should be paid for driving those cattle across the country?

A. No; I did not.

Q. Wasn't that the reason why you were telegraphed to
167 come up there to complete those arrangements?

A. I couldn't tell you that, but this message that I first spoke of—that message stated just what Mr. Taylor told me when I arrived in Hartford, that he had made arrangements, and that message was received in Kansas City four hours before I arrived in Hartford.

Q. What were you up there for at all?

A. I don't know what the necessity was in my going.

Q. You didn't find anything to do when you got there?

A. Nothing, only made the arrangement, or I agreed that I would see if I could have the stock yards enlarged and repaired.

Q. Was that the only thing you went up there for?

A. I don't know what I went for. I went to see what they did want.

Q. Didn't you just get up on your heels and tear around because they invited -ou on such a trivial matter as that that might have been done by wire?

A. If arrangements had not already been made, I certainly would have tried to secure the business.

Q. What arrangements could be made at Hartford?

A. I can't tell you anything about it, only just what the telegram stated.

Q. When you got up there you found no arrangements could be made there, didn't you, and there was nothing in the world for you to do? Isn't that true?

A. Only about the stock yards.

Q. So you couldn't do anything there?

A. It was talked over there. Mr. Taylor asked me if I would take it up and see if I could have the stock yards enlarged and improved, and I taken it up and we had it done.

Q. You said the arrangements had all been made in Kansas City before that time?

A. I didn't know anything about the arrangements in Kansas City. I asked Mr. Taylor if he had wired Mr. Donahue. The arrangements, as I understood it, with Taylor and Brogan were satisfactory to Brogan, and I don't know what those arrangements were.

Q. This was before the first shipments, of course?

A. This was April 11th, 1892.

Q. You had a little ride with Mr. Brogan some time after that, didn't you?

A. Yes, sir.

Q. What was the object of the ride?

A. I came through Hartford one day. Mr. Brogan was at the depot, and I had this letter of I. A. Taylor's, the original letter. I think Mr. Taylor had been removed then from the service of the M., K. & T. I would not be positive about that. Mr. Brogan seemed to think there was something due him, and he taken it up with me, and when he taken it up I had this letter of I. A. Taylor's and I showed it to Mr. Brogan and read it to him. I held the letter so that he couldn't get it. I read the letter to him, stating what Mr. Taylor had done, and Mr. Brogan—Francis Brogan—acknowledged the fact that Mr. Taylor told him almost verbatim what was in that letter.

Q. Mr. Brogan was claiming all this whole that he had made this arrangement with you, wasn't he?

A. Mr. Brogan, that day that I showed him the letter, acknowledged the fact that he had not made the arrangement with me.

Q. When was it you first ascertained that he was making a claim that he had made this arrangement with you?

A. I couldn't give you the dates about that.

Q. Some time before that.

A. I couldn't tell you what the dates were.

168 Q. It was before that date, wasn't it?

A. I don't know whether it was or not when the wrangle came up.

Q. If he had not been claiming that he had made this contract with you before that time, why was it you were armed with a letter to meet him?

A. When it was understood that Mr. Taylor had done something that he had no authority to do, as I understood it at that time, Mr. Rector went to Mr. Taylor to know why he had done it, and Mr. Rector then asked me what I knew about it and I made my statement.

Q. You don't catch the drift of my question.

A. I can tell you what he said. He wrote me a letter and told me to go to Francis Brogan and show him on the letter what this statement of Mr. Taylor's was.

Q. Then you knew before you took that ride that Mr. Brogan was claiming you had made this contract with him?

A. Yes, sir.

Q. When did you first know that he was making this claim that you had made this contract with him?

A. I don't know. I think it was about the time that Mr. Taylor left the service of the company or after.

Q. What time was that?

A. I couldn't tell you.

Q. Approximate it.

A. I don't know that I could do that. I couldn't give you the month.

Q. How long before you took the ride?

A. Well, when Mr. Brogan was on the train with me it was one of the summer months, but I don't know which one. It was warm weather.

Q. Your purpose if meeting him there and taking him along up to Strawn was to convince him that he had not made that arrangement with you?

A. Yes; and I was successful in doing it.

Q You knew prior to that time that he was making a claim that you had made that sort of an arrangement with him—you knew that?

A. I don't think Mr. Brogan ever claimed it until after Mr. Taylor was about to leave the service of the company or had left.

Q. But you knew before you took the ride that he was making this claim on you?

A. Yes; I think it was before that.

Q. Can you tell how you first became aware of the fact that Mr. Brogan was making this claim that you had made this arrangement with him?

A. I think Mr. Brogan sent a bill in to Mr. Rector.

Q. You don't quite catch the drift of my question. You suc-

ceeded in convincing Mr. Brogan that he had made no arrangement with you whatever?

A. He acknowledged that. He said at that time, when I met him on the train, that Mr. Taylor's letter was a fact, and that I had nothing to do with it; that Mr. Taylor had done it himself, and that he was personally responsible for it.

Q. Listen to my question and answer it. Did Mr. Brogan at that time agree with you that he had never made any such agreement as he now claims he had made with you at Hartford?

By the COURT:

Q. You can answer that "yes" or "no."

A. I don't remember exactly just what was said about that at that time. I know the Taylor letter was what I was trying to bring up. I went once to see him after the shipment.

Q. When you got up to Hartford on the 11th of April, isn't it a fact that Mr. Taylor then showed you a telegram from Mr. Cross, president of the M., K. and T. railroad, instructing you to make an arrangement with Mr. Brogan or instructing Taylor to make an arrangement with Mr. Brogan to pay him for driving those cattle over there?

169 Defendant railroad company objected to the question as not being proper cross-examination. The objection was overruled; to which defendant railroad company excepted.

A. No; he did not. Mr. Taylor told me he had received instructions from Mr. Cross to make arrangements, and that he didn't know at what time I could get there and he had gone and done it before I got there.

Q. And you agreed to that sort of an arrangement and rather exulted over the fact that you had got ahead of Mr. Rector. Isn't that true?

A. No, sir.

Q. Didn't you agree with Mr. Taylor that it should be done that way?

A. I said to Mr. Taylor, "Whatever arrangements you make, if you got it from Cross, I have nothing to say in the matter. I am under Mr. Rector."

Redirect examination by Mr. SEDGWICK:

Q. At the time you had this talk with Mr. Brogan did you know from what part of Texas these cattle were coming?

A. No; I don't believe that I did. I don't think that Mr. Brogan knew.

Q. You don't think he knew at that time?

A. No, sir.

Q. That's what you meant when you sent that telegram? That is the telegram lying on the table (indicating Defendants' Exhibit "3").

A. This telegram says the cattle were to come from Midland, but I think Mr. Taylor wired.

Q. Didn't you send this telegram, "Find out what point in Texas 2,500 head of cattle are to come from," etc.?

A. Yes; that's it.

Q. What was the condition of the yards there at Hartford?

A. Well, the yards were small.

Q. Were they in any condition to receive that number of cattle?

A. No; they were not.

Q. Did you send a telegram that arrangements at Hartford had been made?

A. No; I did not.

Q. What was referred to by that language, "Arrangements at Hartford are all made"?

A. All that I know is what Mr. Taylor told me?

Q. What arrangements were you making at Hartford for receiving those cattle?

A. I made arrangements about having the stock yards repaired and made stronger and an unloading incline.

Q. At that time Mr. Donahue had wired you that he had got the cattle for shipment?

A. Yes, sir.

Q. What arrangements were necessary to make before the cattle could be properly received at Hartford, Kansas?

A. It was necessary to have the yards repaired.

Q. I will ask you what you referred to in your telegrams by saying, "Arrangements at Hartford are all made."

A. Only arrangements I had made with the stock yards.

Q. Were they completed at that time?

A. No; the stock yards were not completed at that time. I had just simply agreed to make arrangements to try and to have our transportation department enlarge the stock yards. I don't know about enlarging them. I would not be positive, but we were to make the yards stronger and to build an incline. I think we built the incline with a long platform.

Q. Did you know anything of the sending of that telegram where it says, "Arrangements at Hartford are completed"?

A. Of the one I sent?

170 Q. No; of the telegram that Mr. Cunningham was asking you about.

A. I didn't know of it until since I have been at Emporia.

Q. This time?

A. Yes.

Q. You don't know what was referred to by "arrangements"?

A. No; that's an arrangement Mr. Taylor had made.

Q. You don't know anything about the arrangements?

A. I don't know only the talk, for the sinply reason that I made no arrangements and nobody had asked me about it.

Recross-examination by Mr. CUNNINGHAM:

Q. Then the arrangements referred to in that telegram were not arrangements about the stock yards, were they?

A. The one that I sent?

Q. No; the one Taylor sent.

A. Taylor didn't do a thing with the stock yards. I made the arrangements about the stock yards.

Q. The arrangements Mr. Taylor made were with somebody else and about something else besides stock yards?

A. I suppose they were.

Q. Did you see the cattle unloaded there?

A. I did not.

Q. You were not present?

A. I was not.

L. W. WELCH was examined by Mr. Sedgwick and testified as follows:

Q. State your name, residence, and occupation.

A. L. W. Welch; division superintendent; Parsons, Kansas.

Q. What official position do you occupy with the Missouri, Kansas and Texas?

A. Division superintendent.

Q. Between what points does your supervission go?

A. From Denison to Parsons, from Parsons to Paola, and the line from Parsons to Junction City.

Q. You may state the distance from Denison to Parsons.

A. About 264 miles, I believe.

Q. Do you know the distance from Denison to Ft. Worth?

A. I do not. I think about 96 miles.

Q. You may state the distance from Parsons to Hartford.

A. I think the distance is about eighty miles; about that; I won't be positive.

Q. Did you see the Hozier cattle as they were shipped over the line of road to Hartford?

A. I don't think I did. I don't remember whether I did or not.

Q. Have you any personal knowledge or information concerning a disease known among cattle as Texas or Spanish fever?

A. No; I don't know anything about it. I know there is such a disease or supposed to be, but I don't know anything particular about it.

Q. Have you any information or knowledge as to how that disease is communicated from one animal to another?

A. Only by hearsay.

Q. Have you any information or knowledge concerning what is called the tick theory?

A. No, sir.

Q. Did you ever hear of it until this case?

A. I never did.

Q. How long have you been division superintendent on the line of the Missouri, Kansas and Texas railway?

A. About seven years.

Q. In the shipment of cattle what are the duties of the trainmen handling the cattle?

A. The trainmen are to take the train as they go from one point

to the other and take them to that station and see that they are taken care of as well as possible, as far as the train is concerned.

Q. Have they anything to do with the handling of the cat-le?

A. No; not the cattle; just the train.

171 Q. Whose duty is it to handle and look after and care for the cattle on the train?

A. What we term stockmen—men that are with the cattle for that purpose.

Q. Do men accompany every train-load of cattle of every shipment of cattle?

A. Supposed to; yes.

Q. Who furnishes these stockmen?

A. Men ow-ing the stock.

Q. Who furnishes the transportation for them?

A. The railroad company furnishes cars and engines to pull them.

Q. Did you have any information or knowledge that these Hozier cattle were from south or east of the Government quarantine line?

A. No, sir.

Q. Did you have any information or knowledge that they were not proper or safe cattle to be shipped north?

A. No, sir.

Cross-examination:

Q. Isn't it a fact that from the time the cattle are loaded into the car and are ready for a switch-engine—if a switch-engine be used to get them into a train—that from that time until they reach their destination or reach an unloading place the owner of the cattle or anybody that he has sent has not the right to make a single order concerning those cattle that the railroad is in any sense bound to obey?

A. Has he a right?

Q. Has he a right to make a single order concerning those cattle that the railroad is under any obligation to obey?

A. He has a right to make a request that he may have these cattle—something done in regard to getting them some place or something of that kind.

Q. From the time they are loaded into the train for passage until they reach a point where they may be unloaded for feed or otherwise or for a change of cars, until they finally get to their destination, has the shipper a right to make a single order that the railroad company is bound to obey?

A. I don't know as I really understand.

By Mr. SEDGWICK:

Q. If the shipper should request or demand that that railroad company should set out a car and unload it, would the railroad company be bound to obey it?

A. No; not unless the car was damaged or something of that kind.

Q. That they would do for the safety of their train, would they not?

A. Yes, sir.

Q. And not because he demanded it?

A. If the owner of the stock wanted to feed at a certain point and requested it, we would do that.

Q. I would like your answer, "Yes" or "No." Outside of the feeding of the cattle or the unloading of them either for rest along the journey or for change of cars, has the shipper any right after the loaded car is made up and in the train for shipment to make a single order until the cattle arrive at their destination that the railroad company is bound to obey?

A. No, sir.

Redirect examination:

Q. Were the cattle unloaded at any place between Denison and Hartford?

A. No; not these cattle.

Q. Can you give us the exact time the cattle were moving from Denison to Hartford?

A. (Examining train sheets.) One train left Denison at 11 a. m. June 12th. I can give you Parsons, but I haven't got Hartford. They arrived at Parsons 6.30 a. m. June 13th.

172 Q. Now, what time did it leave Parsons; can you give us that?

A. Yes; 6.50 a. m.; that would be twenty minutes to Parsons.

Q. About what time is the run from Parsons to Hartford?

A. That run is made in about three hours or three and a half. Do you want the other one?

Q. Yes.

A. There was a train left Denison at 4.45 p.m. on April 30th that arrived at Parsons at 8.35 May 1st, and left there at 9.20 a. m. for Hartford.

Q. The next train?

A. The train left Denison at 2.55 p. m. of May 1st and arrived at Parsons at 9.05 a. m. of the 2nd, leaving there at 9.20 of the 2nd for Hartford. Another train left Denison at 3.45 p. m. of April 30th and arrived at Parsons at 8.30 a. m. of May 1st, and left there at 9 a. m. of May 1st.

Q. So far as you know did any of the trainmen that were handling those trains have any knowledge or information concerning the disease known as Texas fever?

Plaintiff objected to the question as incompetent, irrelevant, and immaterial.

By the COURT: Answer that "yes" or "no."

A. No, sir.

Cross-examination:

Q. Were you at Denison when those cattle were brought up the last of April and the first of May?

A. That I couldn't tell you without getting the record to see where I was that day.

Q. Have you any recollection as to whether you saw those trains at Denison at that time?

A. I have not.

Q. Then you think you did not?

A. I can't say that I think I did or did not.

Q. What is your impression as to whether you saw them?

A. My impression is that I don't know whether I saw them or not.

Q. Have you any means of telling, from any data that you have, what time the train reached Denison?

A. I think that paper that we just had will show. (Examine train sheets.) One of those trains reached Denison at 9.50 a. m. and left Denison at 11 o'clock a. m. It was there from 9.50 until 11—an hour and ten minutes.

Q. Tell us as to any other trains.

A. One of the other trains arrived there at 3.50 p. m. and left at 4.35 p. m.; it remained there 55 minutes. One of the other trains arrived at 1.45 p. m. and left at 2.55 p. m.; one of the others arrived there at 2.25 p. m. and left at 3.45 p.m.; it was there an hour and twenty minutes.

Q. Tell us any of the others.

A. That's all.

Q. The cars at Denison are not changed?

A. These freight were not.

Q. Engines changed?

A. Engines changed.

Q. That was a division of M., K. and T.?

A. That's the division of the north and south part of it.

Q. Where do they change engines next?

A. Muscogee.

Q. How long would a train stop there?

A. Do you want the exact time or how long they generally stop?

Q. You may state how long, naturally.

A. Generally from thirty minutes to one hour getting through the yards at the end of a division.

Q. Where next did the engines change?

A. At Parsons.

173 Q. When the train first pulls in, coming up from Ft. Worth, your hands stationed there at Denison take charge of it and begin to handle it?

A. No; the men that are directly under me do that. They are made up of the yardsmaster, who is under superintendent south of Denison. After the train is made up at Denison my men take charge of it and take it out of the yards.

Q. They change crews, too, at Denison, do they?

A. Yes.

Q. And at Muscogee?

A. No; at Parsons.

Q. The same crew runs from Denison to Parsons with freight?

A. No; runs to Muscogee.

Q. And then change crews again?

A. Yes; at Muscogee and also at Parsons, but one of these crews did not change at Parsons, it came on to Hartford.

Q. Some of them did change?

A. All changed but one. One man came through from Muscogee to Hartford; one train did.

Q. What did you say there was a little out of the ordinary run of business as to one of the trains?

A. There wasn't anything out of the ordinary run.

By Mr. SEDGWICK: He said one man came through past Parsons.

A. That's right, but that's not out of the ordinary.

Q. Instead of laying off at Parsons one train came through?

A. One conductor came through.

Q. They all changed at Muscogee?

A. All changed at Muscogee unless it would be some special cars that I would want to run one of my men on.

Q. Were those train hands all changed at Muscogee?

A. Yes, sir.

Q. And all of the conductors and all changed again at Parsons except one of the conductors, with one of these trains, came on up to Hartford?

A. Yes; he came from Muscogee to Hartford.

Mr. SWEENEY was examined by Mr. Sedgwick and testified as follows:

Q. Where do you reside?

A. Parsons, Kansas.

Q. Are you in the employ of the Missouri, Kansas and Texas road?

A. Yes, sir.

Q. In what capacity?

A. In the capacity of superintendent of transportation.

Q. As superintendent of transportation, what are your duties?

A. To supply equipment for the handling of traffic and see that it is handled properly and promptly and to keep proper records of it.

Q. When contracts are made to furnish cars, with whom is such contract made?

A. With the officials of the road upon which the stock is located.

Q. I am speaking of your road. If a contract were made with your road to furnish cars, with whom would that contract be made?

A. There are no contracts made of that kind. Arrangements are made with me.

Q. As superintendent of transportation?

A. Yes, sir.

Q. I will ask you to state whether or not you ever made a contract with Hozier Brothers to furnish them any cars for the transportation of their stock.

A. No, sir.

Q. I will ask you to state if you know what railroad company did furnish the cars to Hozier Brothers for this shipment of cattle.

A. To the best of my knowledge and belief, they were furnished by the Texas and Pacific.

174 Q. Do you know where Midland, Texas, is located?

A. I have a general idea of its location.

Q. Do you know how far west it is of Ft. Worth?

A. I couldn't say from memory.

Q. Do you know on what line of railroad it is located?

A. It is located on the Texas and Pacific railway.

Q. What other railroad runs to Midland, Texas?

A. I am not sure that there is any other. I don't really know that there is any other.

Q. Do you know where the station of Ft. Worth is located?

A. Yes.

Q. What railroads intersect each other at Ft. Worth?

A. The M., K. & T. Railroad of Texas, the Texas and Pacific, the Denver, Texas and Ft. Worth, Denver and Rio Grande, and Gulf, Colorado and Santa Fe.

Q. That is part of the Santa Fe system.

A. It is a separate organization. It is controlled by the A., T. and S. F. and the H. and T. C.

Q. Does the Cotton Belt run there?

A. Yes; the Cotton Belt and the Denver, Ft. Worth and Rio Grande.

Q. Is that a separate organization?

A. Yes, sir.

Q. Over what line of road could it have been possible for Hozier Brothers' cattle to have been shipped north from Ft. Worth?

A. To where?

Q. To this section of country?

A. Well, they could have come by the Gulf, Colorado and Santa Fe and the Atchison, Topeka and Santa Fe, and could have come, I suppose, by the Gulf, Colorado and Santa Fe and 'Frisco line. If the stock went into the 'Frisco Line territory it could have gone into any place here that is convenient to the A., T. and S. F. by the Gulf and Colorado and Santa Fe and the Atchison, Topeka and Santa Fe.

Q. Could it have come over the Cotton Belt?

A. No; not without carrying it around a way.

Q. What is the most direct route from Ft. Worth into this territory?

A. The M., K. and T. They all acknowledge that.

Q. How far is it from Ft. Worth to Denison, if you know?

A. About ninety-six miles. I haven't got the exact distance.

Q. Did you know of the receipt of Hozier Brothers' cattle at the time they were delivered to us at Denison?

A. No, sir.

Q. Did you know that such cattle were on the line?

A. No, sir.

Q. How long after the shipment of the cattle before you knew of it?

A. I didn't know anything about it until the question of unloading them at Hartford came up. There was some question raised on

the arrival of the stock at Hartford was the first time my attention was called to it.

Q. I will ask you to state whether you saw those cattle without knowing whose they were; whether you saw the cattle in transit.

A. I didn't see the cattle that I know of.

Q. Tell the jury what, if any, knowledge you have concerning the disease of Texas fever.

A. No information; no knowledge whatever.

Q. Did you ever hear of the tick theory until this case was tried?

A. Not until yesterday. I have heard about ticks in my life.

Q. You say you heard of these cattle after they arrived at Hartford; some question came up about unloading them?

A. Yes, sir.

Q. Do you remember what that question was?

175 A. Either that the people of Hartford or the people of that county in which Hartford is located or some of the officers of the county, I don't remember which, objected to the unloading of the cattle.

Q. You heard there had been some objection raised?

A. Yes, sir.

Q. Was it this time that you heard about objections to the cattle being unloaded?

A. It was immediately; when the cattle were being unloaded.

Q. Hozier Brothers' cattle?

A. I don't know; it was some cattle.

Q. I am speaking particularly of Hozier Brothers' cattle.

A. No; I didn't know anything about that especially—that is, I couldn't say whether it had reference to unloading the Hozier cattle or some other cattle.

Q. Did you ever hear, until after the cattle had left your line, of any suspicion or intimation that the cattle were not proper cattle to be shipped north or were liable to communicate the disease of Texas fever?

A. No; I never did.

Cross-examination:

Q. How long have you been in the employ of the M., K. and T.?

A. Five years.

Q. In your present capacity?

A. Yes.

Q. You have known of other bunches of cattle having been shipped up this way?

A. Yes; been shipping Texas cattle to different points.

Q. Do you remember having shipped a train-load of cattle to Council Grove in the spring of '92?

A. I couldn't say that I have got any special remembrance of it.

Q. You remember a train-load of cattle going to Council Grove some time?

A. I have got a vague recollection of it.

Q. Isn't it a pretty vivid, now?

A. No; it is not.

Q. Don'r you know you had a good deal of trouble up there, the citizens refused to have them unloaded, and you got them off onto the side track of the Missouri Pacific?

A. There was some question; I couldn't say whether it was at Council Grove or not.

Q. It was some crossing of the Missouri Pacific and the M., K. and T.?

A. I believe it was.

Q. There is no other point?

A. Oh, yes; there are other points where we cross the Missouri Pacific road.

Q. On the Neosho division?

A. Yes.

Q. Where?

A. Piqua.

Q. It was not at Piqua, was it?

A. I can't remember where. There are four points, I think.

Q. Isn't it your impression that it was at Council Grove?

A. I couldn't say which point it was. It was, I believe, at some junction point.

Q. These are the facts: That you shipped a train-load of Texas cattle up there and the live-stock agent and the people and the sheriff said they shouldn't be unloaded there, and you caused them to be shunted off on the side track of the Missouri Pacific, and then tore up the switch, so that they couldn't get back onto your line?

A. I haven't any remembrance of it.

Q. Isn't that true?

A. Not that I know of.

Q. You never heard of anything of that kind?

A. I heard of some stock shipped to some junction point.

Q. And they eventually hauled them back to the Indian Territory?

A. I don't know.

176 Q. Do you know what became of them at all?

A. I do not.

Q. Never heard of them?

A. I don't say I haven't heard, but I don't remember it now.

Q. You knew there was some sort of trouble with Texas cattle, didn't you?

A. Yes; our records would show it.

Q. You remember it independently?

A. No, sir.

Q. You have had trouble with Texas fever so often that it becomes a common, every-day affair?

A. No; but we have a great deal of trouble with Texas cattle people.

Q. What do you mean by Texas cattle people?

A. Shippers; they always complain.

Q. It is generally recognized that Texas cattle are dangerous, and you have to handled them carefully?

A. No, sir.

Q. What do you mean by trouble with Texas cattle people?

A. About the way the stock is handled by our men.

Q. Any more than about our domestic cattle?

A. We don't have but very little.

Q. Do you mean to say simply that Texas cattle get crowded up and more or less hurt or something?

A. The most complaints that come to me are about the time made, that they are delayed longer at this and that point than is necessary.

Q. It is not the character of the trouble up the road here?

A. No, sir.

Q. The trouble arising over that was that the people were insisting that these cattle were dangerous, and they would not have them unloaded. Isn't that true?

A. It must have been. What I am getting at is that the matter did not impress itself on me at the time so forcibly that I can re-me-ber the details of it.

Q. Now that your memory is refreshed, you do remember you had a case of that sort?

A. It was, I guess.

Q. Wasn't that early in the spring of '92?

A. I couldn't tell whether it was '92 or '93 or '91.

Q. It was some time prior to the shipment of the Hozier Brothers cattle?

A. I couldn't say whether it was before or after.

Q. I wish you would refresh your recollection a little on that matter and see if you can't remember it was before the Hosier Brothers shipment.

A. *9.* I couldn't say.

Q. You do say that you know, as a matter of fact, from your experience in shipping Texas cattle over your road, that there is constant trouble and constant inquiry raised as to the safety of these cattle?

A. No, sir.

Q. In this country?

A. No, sir.

Q. Do you mean to tell this jury that there is no more question about shipping cattle from the South up this way than shipping our cattle down that way?

A. Not to my personal knowledge.

Q. Well, your official knowledge, then.

A. No; these are questions that don't concern my duties at all.

Q. Do any complaints come to your office of that sort?

A. No, sir.

Q. You don't hear them at all?

A. No, sir. *A.* No; they might come to my office incidentally from another official. He might come into my office and bring up the subject and talk about it. It would not be reported to me officially.

Q. What do you mean by "officially"?

A. That is no part of my duty to know or to attend to.

Q. I am asking you whether you did know.

A. That's the way I answered your question.

177 Q. Do you know officially, in your character of superintendent of transportation, or unofficially or accidentally or incidentally or any way, about complaints being made about the shipment of Texas cattle over your road, as to whether they are dangerous to the domestic cattle of this State?

A. I do not nor did not hear, officially, personally, accidentally, or otherwise, any objections to it until after this case came up at Hartford, unless this other case that you have referred to come up before.

Q. You said that it was in '91 or '92?

A. I said I didn't know whether it was '91, '2, or '93.

Q. You didn't say '93 at all.

A. Yes.

Q. And this case or that case was the first that you ever knew or had any suspicion that Texas cattle were dangerous to the cattle of this State, was it?

A. It was, except the portion of Texas and a portion of the Indian Territory also which is prescribed in the circular issued by the honorable Secretary of the Department of Agriculture.

Q. You knew that cattle coming from that section of the country were dangerous?

A. Yes, sir.

Q. And the officials of the road generally knew that?

A. Yes, sir.

Q. Did you, as superintendent of transportation, endeavor to ascertain where those cattle came from at all?

A. Their billing shows that.

Q. Answer the question, please.

A. No; I want to explain that now.

Q. Certainly.

A. The billing is furnished to the agent. The agents have instructions regarding the whole traffic of the line—that is, that concerns them. The billings will show from the agent where that came from—the proscribed territory or not.

Q. Do you mean to say the billing would show where the cattle came from?

A. The station they were shipped from.

Q. Does the billing show where they had been kept prior to their being shipped?

A. I shouldn't think so.

Q. You made no effort to ascertain that, did you?

A. No, I didn't; no more than any other stock or any other shipment.

Q. You didn't try to know, did you?

A. No; I didn't try to know.

Q. Didn't institute any inquiries to find out?

A. Didn't know the stock was on the line.

Q. You said you knew cattle coming from within the quarantine

line were dangerous. Now, what steps did you take—what sort of precautions did your road take to ascertain whether or not the cattle which you were shipping into Kansas were dangerous to our cattle?

A. The agents of the railroad had instructions in regard to receiving all commodities of freight traffic. They are governed by those instructions. You couldn't on a railroad inquire into every package and every shipment of stock that is made, or else you would never move a pound of freight over the line.

Q. You said, a few minutes ago, that these instructions did not contemplate investigating the question as to whether the cattle came from within or without the quarantine line.

A. Only as far as loading them is concerned. So far as our men know, they might have been driven from California.

Q. So that your road has no system whatever of ascertaining whether cattle that are being received for shipment are dan-
178 gerous or otherwise, has it?

A. No; they were received from a connecting line, and as they were not shipped from within the proscribed territory our agent could not refuse them.

Q. You knew that the Kansas statute prohibited you from shipping diseased cattle from south of the south line of Kansas, didn't you?

A. Yes, sir.

Q. Yet you took no precautions whatever to ascertain whether the cattle were liable to communicate fever?

A. They didn't come from the infected territory.

Q. How do you know?

A. The shipping point.

Q. You didn't know what territory they had been pastured in?

A. No; didn't know where they had been born or raised.

Q. Yet you were informed that cattle coming from that portion of Texas were likely to be dangerous?

A. No; we were not.

Q. You didn't make the contract for this shipment of cattle?

A. No, sir.

Q. It was made with Mr. Donahue?

A. I had nothing to do with that branch of the business.

Q. These cattle were billed from Midland to Hartford, were they not?

A. I don't know. I never saw the bills.

Q. Isn't that your information?

A. No.

Q. What is your information?

A. I haven't got any.

Q. You have no information about it—have no idea?

A. I have got ideas, but that would not amount to anything.

Q. You have been giving them pretty liberally.

A. I would suppose they were billed from Midland to Hartford. I don't know.

Q. That is your information?

A. No; it isn't my information at all. It is my supposition.

Q. How would you suppose, then, it came about that they were billed from Midland to Hartford if there was no continuous arrangement made by somebody for the shipment of those cattle from the Hozier Brothers?

A. I suppose it was made by Mr. Hozier, or whoever the shipper was. I don't know that; I am only supposing. There's a great deal of stock that comes from the Texas and Pacific railroad that is not billed through.

Q. Now, suppose Mr. Donahue did make a contract with Mr. Hozier to bring those cattle from Midland to Hartford and gave him a through rate, and gave Mr. Hozier directions that when he wanted to make his shipments from Midland all he had to do was to order cars and ask the agent at Midland to set in the cars, would you expect a through billing on that sort of arrangement?

A. No; not any more than on any other arrangement; nothing more than if there was no arrangement. It would depend a good deal on how the rates were given, I should judge.

Q. I am stating a through rate from Midland to Hartford. What would you suppose the billing would be?

A. I don't know.

Q. You don't know?

A. It would be local on both roads, or it could be through rates?

Q. The effect of a bill of lading is simply a sort of manifest to go along with a car?

A. Yes; to facilitate the handling of business.

Q. It doesn't really have anything to do with the arrangement that was made with the original shipper; it is simply a little manifest that goes along?

A. No; the through bill names the rate right from the origin to destination. In a local rate it only covers the locality which
179 the bill covers.

Q. Were those cars ordered from you?

A. No, sir.

Q. From whom?

A. I suppose from the T. and P.

Q. Did Donahue ever make any arrangements about those cars?

A. No, sir.

Q. Did he ever notify you of the arrangement with Hoziers?

A. No; I never heard of any such arrangement being made, not only in this case, but in any other. If it was made, it would have been a very unusual thing. If the Texas and Pacific want a car, a stock car especially, they ask me to send them fifty or a hundred cars, as the case may be. I don't have any information where the cars go.

Q. You have some sort of an arrangement with the Texas and Pacific?

A. I don't know anything about the traffic.

Q. Is it part of the system of the M., K. and T.?

A. No; competitive lines.

Q. The line from Ft. Worth to Denison is part of the same system?

A. It is a separate railroad. The interests are closely identified.
Q. The same president?
A. No; I don't think the same president.
Q. Well, was there at that time?
A. I don't remember now. I don't think they were at that time. I am not certain, though. Of course, that is a matter that can be very easily ascertained?

Redirect examination by Mr. SEDGWICK:

Q. You are aware of the circular issued by J. M. Rusk, Secretary of Agriculture?
A. Yes; I have a copy and issued copies to the agents.
Q. I will ask you just what the M., K. and T. Railway Company did when they received that circular.
A. We reissued it to all our agents and all other employees that would be concerned.
Q. And what instructions were issued?
A. That this should be conformed to.
Q. That those regulations should be conformed to?
A. Yes.
Q. I will ask you if the circular was also mailed to connecting carriers.
A. I couldn't say definitely. It is the usual custom.

Recross-examination:

Q. Is that under your official department—mailing circulars?
A. I remember this case very especially, because the traffic department and my department both issued circulars without knowing the other had done so. The circulars were issued by the two different departments.
Q. So that your department and the traffic department were informed of the dangerous characterter of Texas cattle?
A. For certain territory prescribed in Mr. Rusk's circular.
Q. Then you took no precautions to see that your road did not ship cattle that came from that territory?
A. Yes; we did. We claim that this stock that you have reference to didn't come out of that territory.

CHARLES WORTH was examined by Mr. Sedgwick and testified as follows:

Q. Where do you reside?
A. Parsons.
Q. How long have you lived there?
A. About eighteen or twenty years.
Q. Are you in the employ of the Missouri, Kansas and Texas railway?
A. Yes, sir.
Q. What is your position?
A. Trainmaster.

180 Q. Between what points?

A. From Muscogee to Parsons and Parsons to Junction City and Paola.

Q. You remember the shipment in of the Hozier cattle?

A. Yes, sir.

Q. I will ask you to state what the duties of the trainmen are with reference to handling the trains containing cattle.

A. Their duties is to *to* take the train from one end of the division to the other and see that the train is in running order.

Q. Have they anything to do with caring for or looking after the cattle?

A. No, sir.

Q. Who does that work?

A. They have men in charge of trains of stock to take care of the cattle.

Q. Who furnishes those men?

A. The shipper.

Q. Did such men accompany the Hozier cattle?

A. I don't know personally.

Q. You don't know whether they did or not?

A. No, sir.

Q. Was anybody in charge of the Hozier cattle?

A. Not as I remember of. I don't know.

Q. Was any one accompanying the cattle, rode with them and took care of them as they came along the road?

A. I don't remember. I was not with them.

Q. You didn't see the cattle?

A. No, sir.

Q. Are you acquainted with A. M. Hunter?

A. Yes, sir.

Q. I will ask you to state whether or not you and Mr. Hunter came up to Hartford on the day that the cattle were shipped up there or some portion of the cattle were shipped up there; if you came up on the passenger train.

A. I came up. I started from Parsons on number 10, the passenger train. I don't remember the date.

Q. Was it some time when these Hozier cattle were being unloaded at Hartford?

A. Yes; there was a train-load then going to Hartford and left ahead of the passenger train. I was going to go to Junction City. I got on the train, and Hunter was standing on the platform. I says, "Let's take a ride up the road"—I think that's the time—and he got on the train with me and rode up as far as Hartford, and we both got off there.

Q. Were Hoziers' cattle at Hartford at that time?

A. I think not. I think we passed them at Burlington.

Q. Were any of them at Hartford?

A. Not as I remember of.

Q. Had any of the Hozier cattle been delivered at Hartford at that time, do you know?

A. I am not sure.

Q. Now, I will ask you if Mr. Hunter said anything to you to the effect that the cattle were infected or inoculated with Texas fever *fever* or were liable to spread the disease of Texas fever at any time before you arrived at the station of Hartford or at any time before the cattle were unloaded.

A. No, sir.

Q. Did you have any knowledge of the disease known as Texas fever?

A. No, sir.

Q. Did you ever hear of the tick theory until this trial commenced?

A. No, sir.

Q. I will ask you if you can state from recollection anything about the number of cattle that were shipped in from the South during the year 1892.

A. No, sir.

Q. Were there more than the Hozier Brothers cattle?

A. To Hartford?

Q. Oh, no; to any point on the road that were shipped in over our road.

A. Not as I remember of.

181 Q. Weren't there any shipped to Chetopa?

A. Yes, sir.

Q. Wasn't there cattle shipped to other points?

A. Yes, sir.

Q. Now, I will ask you if you ever heard of any cattle communicating Texas fever at any other point than this particular point.

A. Not that I ever heard of.

Q. I will ask you if you ever knew of Texas cattle, coming in from the South over that line, ever communicating Texas fever before.

A. I never heard of it.

Q. Had you any reason to believe or suppose that the Hozier cattle were inoculated with Texas fever or were capable of communicating it to native cattle?

A. No, sir.

Q. How many cattle were shipped into Chetopa in the spring of '92 and whose cattle were they?

A. There was, I think, 25 or 50 cars; somewhere along there.

Q. About how many cattle would that be; just a rough estimate?

A. I couldn't say.

Q. Do you know where they were from?

A. Those cattle, I think, were from Midland, Texas.

Q. The same cattle?

A. Yes.

Q. I will ask you if there was any Texas fever outbreak after the shipment of those cattle into Chetopa.

A. I never heard of any.

Cross-examination:

Q. When were those cattle shipped to Chetopa?
A. I couldn't give you the exact date.
Q. It might have been in December or January or February?
A. No, sir.
Q. Do you know when any other shipments were made to Kansas?
A. You mean give the exact dates?
Q. Yes, or approximately.
A. I know that Hozier Brothers' cattle were shipped.
Q. I mean outside of them.
Q. Yes; I know of a shipment to Chetopa.
Q. You don't know when that was?
A. No; I can't give the date.
Q. Go on to somebody else, then.
A. And Junction City, I think.
Q. When was that?
A. It was in '92.
Q. What time in '92?
A. I think it was about the 3rd or 4th of February.
Q. Where did they come from?
A. There were two car-loads.
Q. Where did they come from?
A. I think Midland, Texas.
Q. Are you anyways certain about that?
A. I am not certain.
Q. You don't know where they came from prior to the shipment?
A. No, sir.
Q. You simply know they were shipped from Midland?
A. Yes; I could tell by the records.
Q. Are those all the payments you remember of now?
A. That's all I remember of.
Q. Don't you remember of the shipments to Council Grove?
A. Yes, sir.
Q. What time was that?
A. I couldn't say.
Q. What became of those cattle?
A. Those cattle were, I think, delivered to the Missouri Pacific road.
Q. What became of them finally?
A. The Missouri Pacific hauled them to the pasture. They unloaded them in the stock yards first, I think, and then loaded them up and took them to the pasture.
182 Q. Don't you remember of a shipment sent to Council Grove and you had a quarrel with the Missouri Pacific, and finally sent them back over your road into the Territory?
A. I don't remember of them going back.
Q. Don't you remember?
A. No; I remember a shipment going there, and they were delivered to the Missouri Pacific, but I don't remember of their going back.

Q. Don't you remember the people up there kicked about their being unloaded up there?

A. Yes; I remember about their kicking. No; the people didn't kick; it was the Missouri Pacific.

Q. Didn't the sheriff forbid you to unload them?

A. No; they were not to be unloaded at Council Grove.

Q. But they had to be rebilled there for somewhere else. Didn't Hunter go up there and compel the M., K. & T. people to haul them back?

A. They were billed through.

Q. Didn't Hunter intercept them there, and they were finally hauled back over the Missouri Pacific into the Indian Territory?

A. No; I don't think Hunter had anything to do with it.

Q. What time was that?

A. I don't remember the date.

Q. It was before Hosier Brothers' cattle were sent up?

A. Yes, sir.

Q. And the kick was then made because it was alleged that they were dangerous Texas cattle?

A. I didn't hear that.

Q. What was the kick being made?

A. I didn't hear that they were dangerous cattle or anything of that kind.

Q. What was it?

A. All I know is the Missouri Pacific refused to receive them.

Q. Well, why?

A. I don't know why.

Q. You haven't any idea why they refused to receive them?

A. No, sir.

Q. It was extraordinary, their refusing to receive freight.

A. I don't remember what this particular case was.

Q. Wasn't it extraordinary that they should refuse to receive freight?

A. Well——

By the COURT: Yes or no.

Q. Yes; I guess it was.

Q. Couldn't you compel them to receive them if they were all right?

A. They finally did receive them.

Q. Well, what were they kicking about?

A. I don't remember.

Q. You do remember that it was extraordinary that they should kick and yet you don't remember what they were kicking about?

A. They refused to take them. I don't know on what ground.

Q. There was no other incident of that sort, was there?

A. No, sir.

Q. Yet you can't remember why?

A. No, sir.

Q. Now, wasn't it because they were dangerous cattle?

A. I don't know anything about that.

Q. You say you were going up to Junction City that day?

A. Yes, sir.
Q. You didn't go, did you?
A. No, sir.
Q. Well, why?
A. I had a right to turn back at any part of the road I wanted to.
Q. Did you expect to go to Junction City when you started?
A. Yes, sir.
Q. Why did you stop at Hartford?
183 A. I got off there to see the cattle unloaded.
Q. It was an extraordinary sight for a railroad man. You went to see them unloaded?
A. One of the engines on the train played out.
Q. You wanted to see the engine?
A. I wanted to see what time it would get to Hartford.
Q. You didn't stop to see the cattle unloaded?
A. Not particularly.
Q. Then you were mistaken a bit ago when you said you stopped to see the cattle unloaded?
A. I didn't say that.
Q. Oh, I thought you did. How did you know the cattle were to be unloaded at Hartford?
A. They were billed there.
Q. So that you knew the cattle were to be unloaded at Hartford?
A. Yes.
Q. You say you stopped simply to see the engine?
A. The engine broke down and I see that we would probably have trouble with the train and I got off there to see that the train would get there all right.
Q. Couldn't you have seen it just as well when you passed the engine?
A. I didn't know it was broke down when I passed it.
Q. Where?
A. At Burlington.
Q. That's the only reason you stopped, was to see the engine come up?
A. I stopped to receive a few messages and got to talking to the agent and just stopped.
Q. Did you expect Hunter to go clear up to Junction City with you when he started out?
A. I didn't know how far he was going.
Q. What did you ask him to take a ride for, just for fun?
A. Yes, sir.
Q. Nothing talked of in reference to these cattle at all?
A. Not as I remember of.
Q. How long had Hunter been stationed at Parsons?
A. I don't remember exactly.
Q. He was not in the employ of the railroad company?
A. No, sir.
Q. You knew what his business was there?
A. Yes, sir.
Q. Live-stock inspector of the Bureau of Animal Industry?

A. Yes, sir.
Q. You were on very familiar terms with him?
A. Not very.
Q. You thought that day that you would give him a little ride just for fun?
A. Just as he felt about it. He would ride with me quite often.
Q. You were not — familiar terms with him, you said?
A. He is no enemy of mine.
Q. You were not on familiar terms with him at all, you said?
A. Nothing more than I have met him a few times is all.
Q. Had you an idea how far he was going up with you when he started?
A. I don't remember.
Q. Don't you know, Mr. Worth, that you started to go up to Hartford to see those Texas cattle—that you were going up there, you and Hunter together?
A. No, sir.
Q. Why didn't you go on up to Junction City?
A. Just because I didn't want to.
Q. You changed your mind?
A. Yes, sir.
Q. What business were you going on to Junction City?
A. Company business.
Q. What sort of business?
A. To look after the business of the company.
Q. What kind of business?
A. Well, got lots of different kinds of business.
184 Q. What particular kind of business were you going up to look after at that time?
A. I don't remember.
Q. You don't remember whether it was pressing or not?
A. I don't remember.
Q. It was not so pressing that it required you to go on after you started for Junction City?
A. Not as I know of.
Q. You did stop at Hartford and go back on the next train?
A. Yes.
Q. And you did talk about these cattle some with Mr. Hunter?
A. I don't remember anything about it.
Q. You don't remember that you said anything about these cattle at all—two large trains of them?
A. I believe there was two trains.
Q. Yet do you mean to say to this jury that you and Mr. Hunter, who was inspector of the Bureau of Animal Industry, said nothing about *about* those Texas cat-le?
A. I don't remember anything.
Q. Do you mean to tell this jury that you didn't say anything about them?
A. We might. I don't remember whether we did or not.
Q. You may have had a conversation with Mr. Hunter that you don't remember now?

A. I don't remember anything of it.
Q. You don't deny that you did have a conversation with Mr. Hunter about them?
A. I say I don't remember anything of it.
Q. Do you understand my question?
A. Yes, sir.
Q. You don't deny that you did have a conversation with Mr. Hunter?
Q. I say I don't remember whether I did or not.
Q. I would be pleased if you would answer the question.
A. I can't answer it any other way. I don't remember anything of it.
Q. Do you mean by that to say that you didn't have any conversation with him?
A. I mean to say that I don't remember anything of it.
Q. Do you mean to say by that that you can't tell now whether you did or did not have any conversation with Mr. Hunter?
A. Yes; I do not know.
Q. You and Mr. Hunter went back together to Parsons?
A. I think he went to Parsons with me. I am not sure.
Q. When did you go to Junction City next after that?
A. I couldn't tell you.
Q. Your business was not so pressing at Junction City that it required your immediate attendance?
A. No; I guess not.

Redirect examination:

Q. I will ask you to explain your duties as trainmaster.
A. Why, I am expected to see that the traffic is moved promptly over the divisions that I have charge of.
Q. Isn't it your duty to be more or less on the road and keeping the moving train under your eye as near as you can?
A. Yes; I am liable to be called anywhere at any time.
Q. I will ask you if it isn't frequently the case that you might start to Junction City and then change your mind before getting there and in fact go back before going there.
A. Yes, sir.
Q. Although your intention was, probably, in starting out to visit the entire road between Junction City and Parsons?
A. Yes, sir.
Q. I will ask you if it isn't a fact that you are frequently called out and are going out all the time over the line of the road.
A. Yes, sir.

Recross-examination:

185 Q. Do you mean to state to the jury that your purpose is so easily diverted as that it will cause you to turn back after having accomplished half a journey, such a trivial matter as turned you back at Hartford?
A. There was nothing to keep me at Hartford.

Q. What in the world did you stop there for?
A. Just because I wanted to.
Q. You started out with the deliberate purpose to go to Junction City of the business of the company, and just by a mere whim you stopped at Hartford and went back?
A. There might have something happened along the road that I would have to go back.
Q. You didn't know of anything?
A. No, sir.
Q. It was a mere whim that you stopped?
A. There was an engine broken down at Burlington.
Q. At what time did the train go back south from Hartford?
A. I don't remember the time.
Q. Can you tell by remembering train times?
A. No; I don't remember it; got too many trains to remember.
Q. How long did you stay at Hartford?
A. I don't remember that.
Q. Had the cattle trains come in before you went south?
A. Yes, sir.
Q. You saw the cattle unloaded then?
A. I don't remember whether I saw them unloaded or not.
Q. You knew they were unloaded there in the yards at Hartford?
A. Yes, sir.

E. A. HOZIER was examined by Mr. Sedgwick and testified as follows:

Q. You are one of the defendants in this action?
A. Yes, sir.
Q. I will ask you to state to the jury what representations, if any, you made to Mr. Donahue at the time you say Mr. Donahue agreed with you upon a rate for the shipment of these cattle north from Midland, Texas.
A. I don't remember of any, only to give him the business.
Q. What did you state to him as to where the cattle had been raised?
A. I told him they were raised in Pecos county, Texas, west of the quarantine line.
Q. Was that true, as a matter of fact?
A. It was; yes.
Q. I will ask you to describe to the jury the location of your ranch.
A. It is located about fifty miles north of the Southern Pacific road, in Pecos county, running from the Pecos river on the east back west about twenty miles. We have in all about eighty thousand acres under control. I think there are about four or five sections fronting on the Pecos river, and the land runs back west about twenty miles.
Q. I will ask you to describe on that ranch about where your cattle principally roamed or ranged.
A. In order to do that I will have to first tell you about the water.

Q. Tell me about what water there is on that place.

A. Independence creek runs about thirteen miles west of the Pecos river and runs east, emptying into the Pecos river. We have west of that four windmills stationed at different places along on the land back. The furtherest one, I think it's twenty miles west of the Pecos river, and the cattle range along on both sides of the water-courses, from one end to the other of the water-courses. It is pretty hard to tell where the most of them range, but I should say the bulk of the cattle were about half way down the range—
186 that is, where the Independence creek starts in and the first windmill commences.

Q. Did you state to Mr. Donahue that these cattle were inoculated with a disease known as Texas fever or were capable of communicating such a disease, or that any of them had been inside of the quarantine lines or what is known as the infected area?

A. I did not; I didn't know it.

Q. Well, was it a fact, to your knowledge, that such was the case?

A. No, sir.

Q. Did you know that your cattle were crossing the Pecos river, if that was a fact?

A. I didn't know it; no.

Q. Did you ever know of any of your cattle being in Valverde county?

A. No; I did not. Valverde county is quite a distance from our range.

Q. How far is it from your range?

A. I said the other day on the stand that I didn't know the distance exactly, and I don't, but I should judge 75 or 80 miles southeast of our ranch.

Q. Can you give us the area of Pecos county?

A. No; I cannot.

Q. Can you give us the number of miles it is across the county from north to south?

A. No; I can't. It's a very large county, though. I can't give you the distance across there.

Q. Can you give me the distance from your ranch to Midland, Texas?

A. I have heard it was about 125 miles.

Q. Then in order to reach the station of Midland, Texas, you had to drive that distance?

A. Yes, sir.

Q. How far is it from the station of Midland to the west point on the quarantine line, if you know?

A. That I can't say. It is west of the quarantine some distance, but I don't know the exact distance.

Q. I will ask you to state if you know anything about where those cattle gathered that were shipped north.

A. Only by what I have heard.

Q. You may state from whom you heard that.

A. I got information from my brother, who was on the round-up during the time these cattle were gathered.

Q. I will ask you to state to the jury whether you had any knowledge or information or any reason to suspect, even, at the time the cattle were delivered to the railway company at Midland, Texas, or at the time they were delivered to you at Hartford, Kansas, that the cattle were inoculated with Texas fever or were capable of communicating fever or had any of them been inside of the infected area.

A. No; I had not.

Cross-examination by Judge BUCK:

Q. You knew that Hozier Brothers would be liable for damages, if any occurred, if that was a fact, did you not?

A. I never took that into consideration. I supposed our cattle were perfectly healthy. On the other hand, we were very afraid they would take Texas fever.

Q. So far as you know none of them ever did?

A. No; not that I know of. I didn't see the cattle after they were quarantined.

Q. You were at Kansas City when they were sold, weren't you?

A. Yes; I didn't see them sold. I was in Kansas City when they were sold.

Q. How many times have you ever been to that ranch?

A. Two different times.

Q. You have owned it since about the 1st of January, '90?

A. Yes, sir.

187 Q. Do you know about the shape that the ranch is in?

A. Yes, sir.

Q. Is it a fair sort of a parallelogram or does it wiggle around?

A. The land we bought at the Pecos river, it runs back west about thirteen miles, and then southwest about seven miles, and then the leased land runs nearly—well, it is situated nearly west of the deeded land, about twenty miles back from the Pecos river—that is, from the Pecos river to the western boundary of it.

Q. How far north of Independence creek does any of your land extend?

A. It extends about as far north as it does south, with the exception of the tract that I spoke of that runs southwest.

Q. I am talking about the east end of it.

A. It's about equally divided.

Q. And about how many miles either way—north or south of Independence creek?

A. Well, not very wide. I shouldn't think it was over a mile and a half or two miles wide.

Q. Either side of the creek you mean?

A. Yes; north and south of the creek.

Q. Now, there are no fences around it at all?

A. No, sir.

Q. No fences in the country anywhere that you saw?

A. Not very many.

Q. No ranches fenced?

A. None to speak of. We have one pasture fenced of about six thousand acres. It's fenced by wire fence; it's broken country.

Q. Is that about Independence creek?

A. It's north of Independence creek.

Q. As a general rule outside of that pasture there is no fence?

A. That's right.

Q. There is nothing to hinder cattle going anywhere that they please?

A. Only drift fences that are occasionally put across the banks on the west to keep cattle from the west coming in on us; none on the south.

Q. Hozier Brothers bought some cattle of the Pecos Land and Cattle Company previous to your shipment up here?

A. Yes, sir.

Q. About how many?

A. I think less than 100 head.

Q. Where were they delivered to Hozier Brothers, if you know?

A. I don't mean to say that Hozier Brothers bought them. George P. Hozier bought them on his own account?

Q. Were they in with these acattle?

A. Yes, sir.

Q. Do you know where they came from?

A. Only from what my brother tells me.

Q. You don't know personally?

A. No, sir.

Q. Do you know of your own knowledge where the Pecos Land and Cattle Company had its headquarters?

A. Yes, sir.

Q. Where was that?

A. Dryden, Texas, on the Southern Pacific road.

Q. That was southwest of you?

A. Yes, sir.

Q. Do you know anything about how far east their range extended?

A. No; I don't. In driving across from Dryden across to the ranch north I know their cattle ranged between our ranch and the road, but I don't know how far south or how far east.

Q. Now, assuming this map (Exhibit "B") to be substantially accurate, would you say it was over ten or twelve miles from Independence creek, going in a straight line, down to the northwest corner of Valverde county?

A. Well, if that map is correct, it doesn't show there——

Q. My guess of distance is somewhere near right, isn't it?

A. I should judge so from the way this map looks.

By Judge KELLOGG:

188 Q. What do you say as to the correctness of this map?

A. I think it's a long ways from being correct. I have been in the country, and I have naturally heard where Valverde county was located, and I have seen maps. This town of Langtry

here is in Valverde county, and this shows it to be several miles east of the west line.

Q. You don't know positively where any corner of Valverde county is?

A. No; I don't, only from what I have seen on the maps.

Q. Have you ever driven or walked or rode from Independence creek down to where any one said, "You have just got to the northwest corner of Valverde county"?

A. Not that far down.

Q. Did any one who assumed to know ever point out to you just where that corner of the county was?

A. No, sir.

Q. Is it not a fact that the country is, as a rule, after leaving Independence creek an open prairie?

A. That's right.

Q. From '89 on until the time that you made this shipment that portion of Texas had been suffering from a severe drouth, had it not?

A. Not from a severe drouth; no.

Q. Then what you would call something of a drouth, a scarcity of water?

A. Not down in our country.

Q. Over the country?

A. We had a range on our ranch during all this time, not heavy, but a range that kept the grass good.

Q. Do you mean to say that it was really good picking?

A. West of the Pecos river—that is, back a little ways from the river—it was. We have never lost any cattle from drought that I know of.

Q. Were you ever down there when any of your cattle were rounded up?

A. No, sir.

Q. Well, the cattle were allowed to go where they pleased until you wanted them for something, just like every ranch?

A. Yes, sir.

Cross-examination by Mr. MADDEN:

Q. Didn't you have a conversation with Mr. Farrington in September of this year, at Kansas City, in which you said to him that in making your round-up of these cattle that you shipped to Hartford that a portion of them were driven up from Langtry, up the Pecos river?

A. I don't remember what I told him. I may have told him that we usually commenced our round-up down in that country. I didn't know myself just where they commenced the round-up, only from what I heard my brother say.

Q. Didn't you state that you made your round-up and drove your cattle or a portion of them up the Pecos river?

A. On the west?

Q. No; the Pecos river would be in Valverde county, would it not?

A. Yes; after it strikes the northern boundary of the county.

Q. And if you stated that you commenced about Langtry, that would be in Valverde county, would it not?

A. Yes; if they commenced there.

Q. And that would be within the quarantined district, would it not?

A. Yes; it would.

Q. Now, do you say you had such a conversation with Mr. Farrington?

A. I didn't say that from any information I had on this round-up. I say the round-ups usually commence down about there, but my brother, knowing of this shipment of cattle coming to Kansas, knew that they had to be gathered west of the quarantine line.

Q. Do you say now that you did or did not have such a conver-ation with Mr. Farrington?

189 A. I had such a conversation with Mr. Farrington, but whether I said that this particular shipment of cattle was commenced at Langtry I don't remember about that. I remember this, I told him we usually commenced in that section.

Q. Didn't you believe at the time you made this shipment that the quarantine line ran along the Pecos river down to Valverde county?

A. Yes, sir.

Q. And that the cattle west of that river would be outside of the quarantine district?

A. Yes, sir.

Q. Did you believe that at the time you made your shipment?

A. From the information I got from my brother; yes.

Q. Didn't you understand and believe at the time you made your shipment that the quarantine line ran along the Pecos river to Valverde county?

A. That was my understanding. Of course, I don't know how my brother understood it. I got that impression myself—that the Pecos river was the quarantine line clear down.

Q. Clear down to the Mexican line?

A. Yes; and some maps show that it barely reaches Valverde county.

Q. Since that you have learned that runs along the west line of the county and not the Pecos river?

A. Yes, sir.

Redirect examination:

Q. Up to Valverde county the line is the Pecos river?

A. Yes; running south to Valverde county.

Q. That brings it to the southeast corner of Pecos county?

A. Yes, sir.

Q. Which would be about how many miles from your ranch?

A. A good many miles.

Q. Two or three hundred miles?

A. I should say about 150 at least, taking the southeastern part of the county. We are about fifty miles from Dryden west.

Recross-examination by Mr. MADDEN:

Q. How far is it from the northwest corner of Valverde county to your ranch?

A. I have said once or twice that I thought it was about 75 or 80 miles.

Q. Isn't it a fact that your cattle range over the line of Valverde county and along the Pecos river, some of them?

A. I don't know. They range along the Pecos river, but how far down I couldn't say.

Q. No obstructions to prevent them ranging down as far as Langtry?

A. No; it's an open country.

Redirect examination:

Q. The range is not as good down the Pecos river as it is up Independence creek?

A. No, sir.

Q. Or as it is away from the Pecos river?

A. No, sir.

Q. Do you know anything about the establishment of the Government quarantine line?

A. That is the one that was in existence then?

Q. Yes; when these cattle were shipped.

A. I know something about it.

Q. You may state how the line came to be established where it was at that time—that is, the eastern boundary of Pecos county.

A. The year before it ran through the western part of Pecos county but on account, I understood afterward, on application of men north of us they had the line changed and took in some of the counties of the quarantine district—some of the counties north of us. The Secretary of Agriculture thought that cattle coming from Pecos county, being a high altitude, were safe and continued the line on south to Valverde county.

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Q. Throwing Pecos county outside?

A. Throwing Pecos county outside of the quarantine district. That was about February 22nd, 1892.

Q. How far did you understand that line to be from territory which contained infected cattle or cattle that were capable of communicating disease?

A. I understood it was far enough west to prevent any danger of cattle crossing the line coming in contact with other cattle.

Q. How far did you understand it was west of what actually constituted dangerous territory?

A. I don't know. I never heard the distance.

Q. You understood it was far enough west so that cattle would not range onto from that county?

A. Yes; of course, if they had put it on the line, then it would have been uncertain as to whether the cattle from that country would come up.

Q. How long have you owned that ranch?

A. Since January 1st, 1890.

Q. How often have you shipped cattle North gathered on that ranch?

A. Three years; '91, '92, '93.

Q. By what line of road did you ship them?

A. My first shipment was over the Santa Fe, the second over the M., K. and T., and the third shipment over the Santa Fe.

Q. When was the third shipment?

A. In the spring of '93.

Q. I will ask you if cattle from that ranch ever before, to your knowledge, communicated Texas fever.

A. No, sir.

Q. If they had you would have known of it?

A. I would have been very apt to.

Q. How long had you known of cattle being shipped North from that ranch before you became the owner of it?

A. Four or five years.

Q. Did you ever know of Texas fever being communicated by cattle gathered and shipped from this ranch before this shipment?

A. No, indeed.

Q. Something has been said about the altitude of the country there where your ranch is and the kind of country it is. You may state to the jury, if you know, about what the altitude is.

A. It is, as near as I can recollect, about 2,500 feet where we are situated; what we consider a high altitude.

Q. I was wanting to know what kind of country it is; whether low, marshy country.

A. It is a very high altitude. Of course, it is considered that cattle from our country there, in a high altitude, are much more healthy than cattle from the lower districts and east of us.

Recross-examination:

Q. Speaking of cattle being shipped from that ranch previous to your connection with it, you had never been to that ranch previous to buying?

A. I got my information, of course, from the owner, Mr. Tutt.

Q. The cattle in controversy were being shipped *were being shipped* to the pasture here in Kansas and fed?

A. Yes, sir.

Q. To take on more growth and flesh; especially flesh?

A. Yes, sir.

Q. Now, you say you told that fact to Mr. Donahue and whoever you were talking with about this matter?

A. Yes, sir.

Q. Have you ever made shipments from there yourself, as Hosier Brothers, outside of those that we are inquiring about here, for the purpose of pasturage?

191 A. No, sir.

Q. They were shipped to market, the other shipments you made?

A. No; they went to the Indian Territory.
Q. You brought none of them into Kansas except these?
A. No.
Q. They didn't come in contact with any of our native cattle?
A. The first shipment did. They were put in the pasture with native cattle.
Q. What time of year was it?
A. In May; the same time these were shipped in.
Q. Where was that?
A. In the Osage country, about thirty miles south of the Kansas line.

Redirect examination:

Q. These cattle, were they shipped into Kansas and then driven south into the Osage county for pasturage?
A. Yes; over a quarantine trail.
Q. Then they were put into a pasture in the Osage county with ordinary domestic cattle?
A. Yes, sir. The man that pastured the cattle said he had native cattle that he put them right in with. I inquired about that matter after that matter came up.
Q. There was no trouble about that?
A. No, sir.
Q. No fever disseminated?
A. No, sir.

Recross-examination:

Q. Individually, you don't know anything about the style of cattle they were put in with?
A. I saw the cattle; they looked like native cattle.
Q. All cattle are native somewhere.
A. Yes; they didn't have long horns.

Redirect examination:

Q. And those cattle came off the ranch the same as these did?
A. Just the same.
Q. And substantially the same season of the year?
A. Yes; the spring of '91.
Q. I understood you to say just now, and I want to know if I am mistaken, that those cattle were shipped into Kansas and then driven south into the Osage country, and that they were driven over a quarantine trail?
A. That's what I said; along a trail, a quarantine trail, that they allow such cattle to pass through a lane.
Q. There wasn't any quarantine trail made between Hartford and Brogan's ranch that you know of?
A. Not that I know of; not at the time the cattle were unloaded; there was after.
Q. Now, you knew, did you not, that those other cattle in the

Osage country that yours were put in with after being driven down were south of the 37th parallel, and were as such prohibited by the Kansas law as those of yours?

A. What cattle have you reference to?

Q. The Osage cattle that yours were mixed up with. Those were located south of the south line of Kansas?

A. Yes, sir.

Redirect examination by Mr. SEDGWICK:

Q. I will ask you to state to the jury with what ones of these claimants you have made a settlement.

A. Haven't made a settlement with any of them.

Q. What agreement to settle have you made with any of them?

Plaintiff objected to the question. The objection was overruled; to which plaintiff excepted.

192 A. I will say that I have been trying to get a settlement with these gentlemen, but I have not yet accomplished it.

Q. What progress have you made?

A. Part of them have agreed to a settlement and part of them have not.

Q. Is that settlement in writing?

A. Yes.

Q. Have you the original or a copy of it in your possession?

A. No; I have not.

Q. Can you get me a copy of it?

A. I think so.

Q. Does that show what parties have agreed to settle and what have not?

A. Yes, sir.

Q. Have Farrington and Lantry agreed to settle?

A. Yes.

Q. Can you name others who have made settlement? Has the plaintiff in this case?

A. No; not all of them. I think they have all signed it with the exception of two of the attorneys in this case; possibly three.

Q. What remains to be done to carry out the terms of that settlement?

A. Well, I suppose the first thing is to get the signatures of those parties who have not signed it. I have been here three different times trying to get a settlement, and the last time I went back very much perplexed to think I couldn't accomplish it. I have not accomplished it yet. I hope to, though.

Q. Have the terms of the settlement been agreed to by all the parties outside of this written contract?

A. They have. I mean to say that the parties that have not signed it have not agreed to it.

Q. Have they given you to understand that they will agree to it?

A. Well, I can't say that they have.

Q. What have they said to you about it?

A. They claimed that there was a matter that they would hav to take under consideration at this time and I supposed they wer waiting to see whether they had a good case against us in court.

Q. Isn't it a fact that they told you they would not make a set tlement with you until they tried the case against the Missouri Kansas and Texas?

A. No; there is one man I have not been able to get an answe out of up to this time.

Q. All the others have agreed to the terms of the settlement?

A. Yes, sir.

Q. That is your understanding?

A. Yes.

Q. Now, by the terms of that settlement, you are to be absolutely released, are you not, from all liability on this claim?

Plaintiff objected to the question. The objection was sustained to which defendant railroad company excepted.

Recross-examination by Judge CUNNINGHAM:

Q. I will ask you if, when this agreement was signed, the ar rangement was that it should not be binding upon any until all signed it.

Defendant company objected to the question.

Q. Isn't that true?

A. That's true.

Q. So that until all do sign it it is your understanding that it is to be binding upon none of them?

A. That is as I understand it.

Q. They have not all signed it yet?

A. No; I am very sorry to say.

Recross-examination by Mr. MADDEN:

Q. And you would not settle with any particular parties unless you settled with all?

A. No; I would not.

Q. So that whatever agreement you have is conditional
193 upon the signatures of all?

A. Yes; that's right.

Recross-examination by Judge CUNNINGHAM:

Q. You don't understand that there is a consummated agreement even as to any of them—that is to say, it is contingent?

A. Not until I get all the signatures; it was signed with that understanding.

A. T. DREW was examined by Mr. Sedgwick and testified as follows:

Q. You may state where you reside.

A. St. Louis.

Q. Are you in the employ of the Missouri, Kansas and Texas Railway Company?

A. I am.

Q. What position do you hold?

A. Assistant general freight agent.

Q. Who is general freight agent?

A. Mr. C. Hill, in Missouri; Mr. Edwin Adams, in Kansas; Mr. John W. Allen, in Texas.

Q. Who is traffic manager of the road?

A. Mr. D. Miller.

Q. As assistant general freight agent what are your duties?

A. I have charge of the traffic claims. I have charge of the rates and tariffs.

Q. I will ask you to state to the jury whether the company and most railroad companys have not two tariff rates.

A. They have.

Q. You may explain to the jury the difference between the two rates.

A. We have a tariff called an owner's risk tariff and a carrier's risk tariff. Usually railroads have two forms of contracts—bills of lading or receipts for freights.

Q. What do you mean by owner's risk?

A. Let me explain it, Judge. We understand it as an owner's risk that the carriers are released except as to common-law liability. A carrier's risk contract makes the company liable for the shipment without any stipulations or limitations at all.

Q. Which is the higher rate?

A. The carrier's risk, of course.

Q. Or the one where we bind ourselves under common-law liabilities?

A. Yes, sir.

Q. Now you may state to the jury which kind of a contract this is (indicating). There are five of them, all just alike (like stock stock contracts, being Exhibits A, B, C, D, and L, attached to answer of R'y Co.).

A. This is an owner's risk contract or bill of lading.

Q. That is one of the contracts where the carrier's risk is limited?

A. Yes, sir.

Defendant railroad company offered in evidence and asked to be permitted to read to the jury the circular issued by Jeremiah Rusk establishing the quarantine line in Texas, Exhibit "E" attached to answer of defendant railway company.

Plaintiff objected to its introduction as incompetent, irrelevant, and immaterial. The objection was sustained by the court; to which defendant railroad company excepted.

Defendant railroad company offered in evidence the permits issued

by the State live-stock commission, Exhibit "I" and "J" attached to answer of defendant R'y Co. The plaintiff objected to their introduction as incompetent, irrelevant, and immaterial.

The objection was sustained; to which defendant railroad company excepted.

194 Q. You may state whether or not those shipments of the Hozier Brothers were made in strict accordance with the sanitary regulations and rules of the Department of the Bureau of Animal Industry established by the act of Congress.

Plaintiff objected to the question as incompetent, irrelevant, and immaterial, as calling for a conclusion of law and not a statement of fact, and for the reason that the witness had not shown himself to be competent to testify. The objection was sustained; to which defendant railroad company excepted.

Plaintiff and cross-petitioners admitted that the paper attached to the answer of the defendant railway company and marked Exhibit "E" was a correct copy of a circular that day issued by Jeremiah M. Rusk, Secretary of the Department of Agriculture.

Defendant railroad company offered to introduce in evidence Exhibit "E." Plaintiff objected to its introduction as incompetent, irrelevant, and immaterial. The objection was sustained; to which defendant railroad company excepted. Plaintiff and cross-petitioners admitted that the two papers marked Exhibits "J" and "I" were exact copies of papers signed, one without date and the other dated June 3rd, 1892, and that they purposed to be signed by Albert Dean, inspector of the Bureau of Animal Industry at Kansas City, Kansas.

Q. You may state wh-ther or not those Hozier cattle were shipped in strict accordance with the rules and regulations of the Department of Animal Industry, as shown by the circular of Rusk, the Secretary, that has been referred to.

Plaintiff objected to the question as incompetent, irrelevant, and immaterial, and for the reason that it involved a conclusion of law and not a statement of fact. The objection was sustained by the court; to which defendant railroad company excepted.

Q. Now, Mr. Drew, you may state whether or not the railroad company received a copy of this circular issued by the Honorable Jeremiah M. Rusk shortly after it was issued.

A. Yes, sir.

Plaintiff and cross-petitioning defendants admitted the last statement of the witness to be true.

Q. Now, I will ask you to state to the jury whether or not the railroad company made all reasonable effort to comply with the requirements or regulations embraced within that circular.

Plaintiff objected to the question for the reason that it involved a legal conclusion and for the reason that the question of negligence or its absence was a thing to be found by the jury and was not a

matter to be testified to by any witness. The objection was sustained by the court; to which defendant railroad company excepted.

Q. You may state from what point to what point the Missouri, Kansas and Texas Railway Company operates a line of road.

A. Denison, Texas, to Hannibal, Missouri, and from Parsons to Junction City; from Paola to Coffeyville and Stevens, Indian Territory.

Q. In operating the line of road from Denison, Texas, to Hannibal, Missouri, state through what States and Territories that line is operated.

A. The Indian Territory, Kansas, and Missouri.

Q. In operating the line of road from Denison, Texas, to Junction City through what States and Territories is that operated?

A. The Indian Territory and Kansas.

Q. And this particular shipment, from Denison to Hartford, through what States and Territories was it made?

A. Indian Territory and Kansas.

Q. How far from inside Texas did it come?

A. Short distance, a mile or two.

Q. Do you know the distance from Ft. Worth to Midland, Texas?

195 A. Something like 400 miles, I believe.

Q. Now, over and through what States and Territories would the shipment of cattle come from Midland, Texas, to Hartford, Kansas?

A. Texas, the Indian Territory, and Kansas.

Q. I will ask you to state to the jury whether you have had any special acquaintance with or knowledge of Texas fever.

A. No; I have not.

Q. When, if at all, did you ever hear of the tick theory until the commencement of the trial of this case?

A. I never heard of it until I came into this court-room.

Q. How long have you been connected with the traffic department of the Missouri, Kansas and Texas railway?

A. Well, I have been on the road, in various positions, -or about fourteen or fifteen years.

Q. In what various positions have you served?

A. Served as baggage master, as clerk, check clerk, agent freight, claim agent, general traffic claim agent, and assistant general freight agent.

Q. At what points were you agent for the Missouri, Kansas and Texas railway?

A. Denison, Texas.

Q. How long were you there?

A. Nearly four years.

Q. How long is it since you were promoted from agent to freight claim agent?

A. About four years.

Q. I will ask you if it is not your duty, as traffic claim agent, to

investigate all claims made for the outbreak of Texas fever caused by shipments of cattle over the Missouri, Kansas and Texas railway.

A. Yes, sir.

Q. That is, where they claim damages of the road?

A. Yes, sir.

Q. I will ask you if, during the four years that you have been connected with the road as traffic claim agent, there has ever been shipped into Kansas by the Missouri, Kansas and Texas Railway Company cattle that communicated the Texas fever, except this shipment to Hartford.

A. No; not that I know of. I never heard of them.

Q. State to the jury whether or not it is a fact that the company are shipping into the State more or less cattle every year from portions of Texas.

A. They are.

Q. I will ask you if you know of your own knowledge whether cattle had been received by your company for shipment that had been loaded at Midland and Pecos and points down there in west Texas, on the Texas and Pacific railroad, prior to the shipment of these Hozier cattle.

A. Yes, sir.

Q. State to the jury whether any of those cattle ever communicated Texas fever to the native cattle of Kansas.

A. I never heard of it.

Q. Did you have any knowledge or information that Hozier Brothers' cattle were infected or inoculated with the disease of Texas fever or were capable of communicating the disease to native cattle?

A. No, sir.

Q. Had you any reason to suspect that to be a fact?

A. No, sir.

Q. Did you see the Hozier cattle?

A. I am inclined to think I saw one train of them. I am not sure about it.

Q. Did you make any inspection of them?

A. No; I think I was at the depot at Parsons when they went through there. I am not sure even of that.

Q. I will ask you to state whether or not it is a fact that
196 the Bureau of Animal Industry kept inspectors along the line of the road.

A. Yes, sir.

Q. And if it is, state what the duties of those inspectors were, if you know.

A. To see that the regulations of the department were complied with.

Q. Do you know at what points the Bureau of Animal Industry kept inspectors?

A. They had one at Ft. Worth, one at Parsons, and one at Hannibal.

Q. State what course the railroad company has pursued when

those inspectors informed the railroad company that the cattle were not proper cattle to be shipped north.

A. Always took means to comply with the instructions of the inspectors.

Q. Now, Judge Buck has asked some of the witnesses in regard to the shipment of cattle that came to Council Grove. You may state whether or not you are acquainted with that shipment of cattle and you may state all you know about it.

A. I know of a shipment. They were from Italy, Texas; I believe about twenty-five miles south of Davis, in central Texas.

Q. Was that without the quarantine line?

A. Inside of the quarantine line several hundred miles.

Q. From whom did we receive those cattle? From what connecting carrier did we receive them?

A. They were loaded on our own line.

Q. I thought they were loaded on the Houston and Texas Central?

A. No; they were loaded, I ink, the day before, or the day before that that the quaranti law went into effect. In other words, they were in transit w the quarantine law went into effect.

Q. When the regulations went into effect?

A. Yes, sir.

Q. They had been loaded prior to it?

A. Yes; I think either the day before or the second day before.

Q. State whether any regulations had been complied with in the shipment of those cattle.

A. They had not.

Q. When the inspector complained of them what was done?

A. Well, we had a small-sized civil war at Council Grove and finally turned the cattle over to the company and I sold them.

Q. We shipped them back and sold them?

A. Yes; shipped them out of the station and sold them.

Q. That was done upon whose request?

A. Upon the request of the State sanitary board, after they convened and passed on the points involved.

Q. Did you have any knowledge or information that any of those Hozier cattle had been across the line inside of the infected territory immediately prior to being shipped?

A. No, sir.

Q. What time of year was it that those Council Grove cattle were shipped in?

A. February, I think.

Cross-examination:

Q. You told Mr. Sedgwick that it was an actual practice of the company to comply with any requests or directions of these Government inspectors of cattle. Did they ever make, to your knowledge, any requests about any cattle coming up from Texas, except as to this shipment you have mentioned having trouble with at Council Grove?

A. Yes, sir.

Q. Well, now, leaving that out of mind, state the first instance that you can recall where Government inspectors had anything to say to any of your officers or agents, that you knew of.

197 A. The most trouble we have with cases of that kind are with men who have what we call emigrant outfits, a cow or two cows, with a car-load of household goods and farming utensils and that kind of stuff. They are usually loaded and the railroad people know nothing of it. These are inspected, and wherever found they are taken out and held. It is not an infrequent occurrence to find what we call "contraband shipments."

Q. That is where some emigrant wants to get all the use out of his car and chucks his cow in?

A. Yes; takes everything he has got.

Q. Omitting that thought and that line of annoyance, give any instance where Texas cattle were being shipped through in quantities, aside from the Council Grove trouble, where you had any knowledge of the inspectors complaining about anything.

A. I don't know of any other case.

Q. Have you ever had any personal knowledge of shipments of cattle from the southwest of Texas, aside from the Hozier cattle, where they were brought up in the summer and put into a pasture with our domestic cattle in Kansas?

A. We had several trains go up to Manhattan via Junction City, by Joe Baker, of Slater, Missouri.

Q. When was that?

A. That was last year, and the year before I believe he also shipped several trains, I think 125 cars, probably, to Chetopa. Chetopa is two miles or two and a half from the line.

Q. What time of year was that?

A. In March.

Q. Did you yourself have any knowledge of where they had been wintered the previous winter?

A. Only the billing. They were billed from Midland.

Q. That billing doesn't indicate whether they were fed within three miles or three hundred of there?

A. No, sir.

Q. Do you now think you saw any of those Hozier cattle?

A. I am not prepared to make any kind of answer on that. I said I thought possibly I was at the depot. I had a great deal of business there, and I may have seen them and I may not.

Q. Is that a recollection that you have or an impression from knowing the amount of business that you had?

A. It's only a vague impression. I haven't any vivid recollection of it at all.

Mr. CURTIS was examined by Mr. Sedgwick and testified as follows:

Q. Where do you reside?

A. Parsons, Kansas.

Q. How long have you lived there?

A. About three years.
Q. What is your business or occupation?
A. I am a railroad conductor.
Q. How long have you been a railroad conductor?
A. More or less for twenty-odd years.
Q. How long have you been in the employ of the Missouri, Kansas and Texas railroad?
A. About four years.
Q. Do you know Hozier Brothers?
A. No, sir.
Q. Do you remember a shipment of cattle to Hartford, Kansas, in the spring of '92?
A. Yes, sir.
Q. Were you one of the conductors in charge of one of the trains from Muscogee north?
A. I was.
Q. I will ask you what experience you had had with or knowledge you had of the disease known as Texas fever.
A. None whatever.
198 Q. I will ask you to state to the jury whether you had ever heard of what is called the tick theory until you came to the court-room here at this trial.
A. Why, I had noticed ticks on the cattle, but I didn't know they had any connection with Texas fever until I came to this court-room.
Q. I will ask you what, if anything, the trainmen have to do with handling cattle that are being shipped over the line of road.
A. In the cars you mean?
Q. Yes.
A. Nothing.
Q. Were there men accompanying these cattle for the purpose of taking care of them?
A. Yes, sir.
Q. You made no inspection or examination of the cattle?
A. No, sir.
Q. Did you see the cattle at any time outside of the cars before they were unloaded at Hartford?
A. No; they were not outside of the cars until they were unloaded at Hartford.
Q. You took no notice of the cattle in the cars?
A. I just noticed whether they were down or not. If I saw an animals in bad shape I would call the shipper's attention to it.
Q. Now, you said a minute ago that you had seen ticks on cattle. I will ask you to state whether or not you saw any ticks on these particular cattle or whether you had noticed ticks on cattle.
A. I have seen ticks on cattle, but I don't know on these particular cattle that I saw any ticks at all. I have just noticed at different times.
Q. You have seen ticks on cattle?
A. Yes, sir.

Q. You didn't know until you came to the court-room that they had anything to do with Texas fever?
A. No; never heard of that before.

Cross-examination:

Q. Do you mean ticks on the cattle that were being hauled over the road or as a boy on cattle that your parents owned?
A. I mean cattle that I saw on the cars that were being transported over the road?
Q. Cattle shipped up from the South?
A. Yes, sir.
Q. But you don't remember as to these?
A. No; I don't remember any particular train-load.
Q. You were not supposed to have anything particular to do with the cattle; you were not looking; you just recollect that you have seen them and you don't recollect where?
A. I have talked with different trainmen and brakemen about cattle having so many ticks on them.
Q. Is it rather a common thing in bringing up these cattle to see ticks on them?
A. Yes, sir.

Redirect examination:

Q. Did you have any information or knowledge that these cattle were capable of communicating Texas fever?
A. No, sir.
Q. Did you have any information or knowledge that they were ever inside of the quarantine lines—that is, I mean south or east of the quarantine lines?
A. The waybills we had were not stamped "Southern cattle," which is customary when they are loaded inside of the quarantine line.
Q. All you knew about where they were from was what the waybills disclosed.
A. That's all.
Q. Do you remember where those cattle were from?
A. Not positively; I think from Midland.

Recross-examination:

Q. Did you ever make any inquiries as to where they did come from actually?
199 A. It is possible I might have talked with the shipper about where they came from.
Q. Do you remember it now?
A. I don't know that I do. I sometimes do speak to the shipper and ask him what part of Texas he is from and what part of the country, and whether I did in this particular shipment I don't remember.
Q. Were not your waybills stamped by Mr. Hunter at Parsons with this legend, "Southern cattle"?
A. No; not in this particular case.

Mr. COLLINS was examined by Mr. Sedgwick and testified as follows:

Q. Where do you reside?
A. Parsons, Kansas.
Q. How long have you lived there?
A. Pretty near nine years.
Q. What is your business or occupation?
A. Railroad conductor it has been.
Q. How long have you been railroad conductor?
A. Six or seven *yeas* years.
Q. How long have you been in the employ of the Missouri, Kansas and Texas Railway Company?
A. Pretty near nine years.
Q. Do you remember of the shipment of Hozier Brothers' cattle to Hartford, Kansas?
A. I remember of a shipment to Hartford. I don't know who they belonged to.
Q. Do you remember a shipment in '92?
A. I handled a train of stock billed to Hartford.
Q. In '92?
A. In '92.
Q. Could you tell from the movement of the train whether it was the train you refer to or not by taking the train sheet?
A. I have got my book here; that's the only way I could tell.
Q. Give me the number of the trains and number of the cars.
A. (Looking at train book.) I left Muscogee with six, 106, May 1st at 2.25 in the morning; sixth section of train number 106.
Q. Was that a train that was loaded with cattle billed to Hartford, Kansas? Do you remember that, to-?
A. No, sir.
Q. Do you remember where the cattle were from?
A. No, sir.
Q. I will ask you to state to the jury whether at that time you had any information or knowledge concerning the disease known as Texas fever.
A. No, sir.
Q. Did you make any examination of these cattle?
A Nothing more than to see what condition they were in in the cars as I passed along the train.
Q. You may state to the jury whether you had any information or knowledge that the cattle were from inside of the quarantine line.
A. No; I did not. I had not knowledge of it.
Q. Did you have any information?
A. No, sir.
Q. From no source?
A. From no source whatever.
Q. State whether or not there were men along in charge of the cattle.
A. I couldn't say whether there were men along with this train. It is the custom.

Q. Are the railroad men supposed to take charge of the cattle or to have anything to do with them?

A. No; nothing more than to see that the train is gotten over the division in safety, without accident to the train.

Q. Did you ever hear of the tick theory in connection with Texas fever until the trial of this case?

A. No, sir.

Mr. LORD was examined by Mr. Sedgwick and testified as follows:

Q. Where do you live?

A. Parsons, Kansas.

200 Q. What is your business or occupation?

A. Railroad conductor.

Q. How long have you been there?

A. Since the year '86.

Q. Upon what line of road?

A. The M., K. and T.

Q. How long have you been a conductor on the M., K. and T.?

A. Since '86.

Q. I will ask you if you are acquainted with Hozier Brothers.

A. No, sir.

Q. Are you acquainted with Brogans, of Hartford?

A. No, sir.

Q. Do you remember a shipment *a shipment* of Hozier Brothers' cattle to Hartford in May and June, '92?

A. I remember a shipment of cattle to Hartford; yes.

Q. Have you any way of telling whether you were one of the conductors in charge of one of the trains?

A. Yes, sir.

Q. How can you tell?

A. By my train book.

Q. What was the number of your train?

A. First, 104, on May 2nd.

Q. How many cars were there in that train?

A. Twenty.

Q. All loaded with cattle billed for Hartford, Kansas?

A. Yes, sir.

Q. I will ask you to state to the jury whether or not, at that time, you had any knowledge or information concerning the disease known as Texas fever.

A. I had no knowledge of it. I have heard of that fever.

Q. Did you make any inspection of those cattle?

A. No, sir.

Q. Were there men along with your train in charge of your cattle?

A. Yes, sir.

Q. Were you and your assistants required to do anything towards taking care of the cattle any way further than to carefully manage the train?

A. Carefully manage the train and see that the men in charge of the cattle did their duty was all.

Q. Did you ever hear of the tick theory in connection with Texas fever before the commencement of this trial?

A. No; I did not.

Q. You may state whether any of the brakemen or men under you in charge of that train had any knowledge or information regarding Texas fever, as far as you know.

Plaintiff objected to the question.

By the COURT:

Q. State yes or no. Did they or not?

A. They did not, as far as I know.

Plaintiff consents that the same question shall be asked of Curtis and Collins, and it is admitted that they will say that the men under them had no knowledge or information, as far as they knew.

Cross-examination by Mr. MADDEN:

Q. Isn't it a fact that after cattle are loaded upon your cars your company has sole charge of them, and that you don't expect the owner of the cattle to look after them further?

A. Expect them to look after them?

Q. Until you deliver them.

A. Yes, sir.

Q. All you expect them to do is to look after the cattle—see that none of them get down in the cars?

A. That's all.

Q. They would have no right to switch them off or anything of that kind?

A. Well, I don't know. If such a thing should come up, I would have to ask for information.

Q. Your company, though, would have a right to switch them off any place you wanted to along the route until you finally delivered them?

A. I don't know as to that right.

Q. If a car gets out of fix, or anything happens that you might want to run it on the side track for repairs, the owner of the cattle could raise no objections?

201 A. Not to a bad order car; no.

Q. Don't you understand the fact to be that your company has sole charge of the cattle, in the way of shipment, except looking after the cattle that may get down in the cars, until they are delivered at the place of destination—that the company is responsible for the safe delivery of the cattle?

A. I have understood it that way.

Redirect examination:

Q. You don't understand that the company has anything to do with the handling of the cattle?

A. No; just the movement.

Mr. HALEY testified as follows:

Q. Where do you live?
A. Parsons, Kansas.
Q. What is your business or occupation?
A. I am a freight conductor.
Q. How long have you been such freight conductor?
A. Four years.
Q. With what company?
A. Missouri, Kansas and Texas.
Q. I will ask you if you remember a shipment of cattle by Hozier Brothers to Hartford, Kansas, in May and June, '92.
A. I remember of a shipment of cattle to Hartford, but I don't remember who they were for.
Q. Did you bring one of those trains?
A. Yes; from Muscogee to Parsons.
Q. Have you the number of it?
A. Yes.
Q. What was the number of your train?
A. I was first 104.
Q. At that time did you have any special knowledge or information regarding the disease known as Texas fever?
A. No; I knew of such a disease, but that was all.
Q. Could you at that time distinguish between an animal that was capable of communicating Texas fever and one that was not?
A. No; I could not.
Q. Did you ever hear of the tick theory in connection with Texas fever until the commencement of this trial?
A. No; I never heard it till in this court-room.
Q. You may state whether or not any of the men under you, as far as you knew, had any special knowledge or information in regard to the disease known as Texas fever.
A. Not as far as I know.

Cross-examination:

Q. Did you see ticks on these?
A. I have seen ticks on cattle, but I don't remember whether there were any ticks on these particular cattle or not. I don't remember exactly. We handle a great many cattle.
Q. You didn't look to see whether they had or not?
A. I don't remember.

Cross-examination by Mr. DENNIS MADDEN:

Q. On what division did you say you had charge of the cattle?
A. Between Muscogee and Parsons.
Q. Who had them between the place of shipment and Muscogee?
A. I don't know, sir.

Mr. LANEY testified as follows:

Q. Where do you reside?
A. Parsons, Kansas.

Q. What is your business or occupation?
A. I am a railway conductor.
Q. How long have you been a railroad conductor?
A. About six years.
Q. Do you remember of a shipment of cattle assigned to Hozier Brothers, at Hartford, Kansas, in May and June, '92?
202 Q. I remember the shipment of cattle to Hartford, but I don't remember who they were assigned to.
Q. Did you have charge of one of the trains?
A. Yes, sir.
Q. You may give me the number of your train?
A. My train was extra engine 84.
Q. That train was loaded with cattle for Hartford, Kansas, was it?
A. Yes, sir.
Q. You may state whether, at that time, you had any information or knowledge concerning a disease known as Texas fever.
A. I had heard of the disease; I didn't know anything about it.
Q. Did you have any information or knowledge concerning the disease?
A. No, sir.
Q. Could you at that time distinguish between an animal capable of communicating the disease and one that was not?
A. No, sir.
Q. Could you tell, by looking at an animal, whether it was from inside or outside of the quarantine lines?
A. No, sir.
Q. Did you ever hear of the tick theory in connection with Texas fever until the commencement of this trial?
A. Never till this controversy came up here, this trial.
Q. State whether or not, as far as you know, brakemen and other men under you in charge of that train had any information or knowledge concerning Texas fever.
A. As far as I know, they didn't know any more about it than I did.

Cross-examination by Mr. DENNIS MADDEN:

Q. On what division did you operate this train?
A. Between Parsons and Hartford.

Mr. CHAPMAN testified as follows:

Q. Where do you reside?
A. Parsons, Kansas.
Q. How long have you lived there?
A. Six years.
Q. What is your business?
A. Railway conductor.
Q. How long have you been conductor?
A. Five years; about five.
Q. I will ask you if you remember the shipment of cattle to Hozier Brothers, Hartford, in May and June, '92.

A. I had a train of cattle to Hartford; I don't know who they were for.

Q. What was the number of your train?

A. Extra north, extra engine 97.

Q. I will ask you to state whether or not there were persons in charge of the cattle on that train.

A. I think there were.

Q. Did you examine or inspect the cattle?

A. No, sir.

Q. Did you have any knowledge or information concerning Texas fever?

A. No, sir.

Q. Could you tell the difference between an animal capable of communicating Texas fever and one that was not?

A. No, sir.

Q. Did you ever hear of the tick theory until this case?

A. No, sir.

Q. So far as you know, did any of the men under you, in charge of that train, have any information or knowledge concerning the disease known as Texas fever?

A. No, sir.

Cross-examination by Judge CUNNINGHAM:

Q. How long did you say you had been in the employ of the railroad?

A. About five years.

Q. As a conductor?

A. Yes; most of the time.

Q. Your company has never, so far as you know, given its employés—that is, conductors and brakemen—any instructions regarding the dangerous character of Texas cattle and the means to ascertain when cattle are dangerous?

A. Why, nothing; only a circular which was put up in the office.

Q. What was the contents of that circular?

203 A. It was a circular which was put up by Rusk.

Q. They have never instructed you to make any inquiries as to where these cattle came from, have they?

A. No, sir.

Q. They have never instructed you in any means of ascertaining whether they were liable to communicate the disease or not, have they?

A. No, sir.

Q. They have not instructed you that the presence of the cattle tick indicates that the cattle are dangerous, have they?

A. No, sir.

(Here follows map marked p. 204.)

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Cross-examination by DENNIS MADDEN:

Q. Where did you have charge of these cattle?
A. From Parsons to Hartford, ten cars of them.

Mr. LANEY was here recalled by defendant and testified as follows:

Q. I believe I didn't ask you if you had made inquiry at all with regard to these cattle. I now ask you the question.
A. Yes, sir.
Q. Of whom did you make any inquiry?
A. Of Mr. Hunter.
Q. Where?
A. At Parsons; in the bill office at Parsons.
Q. State what you said to him and what he said to you. You mean the Government live-stock inspector?
A. Yes; when I was checking up my bills for these cars Mr. Hunter was there examining them, and I see there was no "Southern cattle" stamp on them and they was from Texas. I says, "Mr. Hunter, are these cattle all right? Will I have any trouble up there?" He said, "No; they are all right."

Cross-examination:

Q. He told you they had proper papers all the way through?
A. He didn't say anything about the papers.

Defendant railroad company offered in evidence a map issued by the Department of Agriculture, prepared by the Bureau of Animal Industry, showing the quarantine line as defined by the Honorable Jeremiah M. Rusk, Secretary of Agriculture, of date February 26th, 1892. (See *ante* page 381.)
The map was marked "Defendants' Exhibit 5," and was considered in evidence.

A. T. DREW was recalled by defendant and testified as follows:

Q. I forgot to ask you when you were on the stand this morning if you knew the rate given Hozier Brothers for these cattle.
A. Yes, sir.
Q. I will ask you if you know what the regular tariff rate, under that kind of a bill of lading, was to Bazaar.
A. No; I don't know. I understand, although I haven't looked it up lately, that it was $75 for a standard car.

W. V. GALBREATH was examined by Mr. Sedgwick and testified as follows:

Q. Give us your official name, residence, and occupation.
A. W. V. Galbreath, Denison, Texas; superintendent stock yards, Missouri, Kansas and Texas.
Q. Is that your present position?
A. Yes; that is one of them.

Q. What is there in Texas fever to distinguish that from these other disease- you have mentioned as to external appearance?

A. Nothing that I know of. You understand by that I mean if I was taken in to a herd that was sick and dying I believe it would be impossible—I don't think there is a man on earth that could possibly make a diagnosis without first holding a post-mortem examination.

Q. I will ask you as to the post-mortem symptoms. What is there in the post-mortem symptoms to distinguish Texas fever from these other diseases?

A. The post-mortem lesions are about the same as those that Dr. Richards gave. The other disease-, of course, are entirely different.

Q. Do you know anything about the tick theory?

A. The tick theory is not positive. It's only one man's say-so It is not accepted by the veterinary profession.

Q. It is not accepted by the vet-rinary profession?

A. No; it's too soon.

Q. How long ago since the tick theory was advanced by any scientifi*f* veterinary?

A. Well, the only written expression we have of it is that by Theobald Smith, who is microscopist of the Bureau of Animal Industry. It isn't Dr. Salmon's theory.

Q. Who is Theobold Smith?

A. He is microscopist under the Bureau of Animal Industry.

Q. Is he a veterinary?

A. No; he graduated this last spring. He is an M. D.

Q. You know of the tick theory, do you?

A. I know there has been some talk in regard to the tick theory. I never heard it in a court before until I came here.

Q. You never did?

A. No, sir.

Q. You may state how the disease is communicated from Southern cattle capable of communicating the disease to our native cattle.

A. Well, it's communicated by the urine and the f*eacle* matter.

Q. What is necessary to be done to communicate it?

A. It is necessary for the native cattle to eat it—take it in with their food.

Q. I will ask you to state what the result was of any experiments that you know of being made and what those experiments were.

A. The experiments that I am familiar with is that of soil that was brought from the infected area and was washed out, thoroughly saturated with water, and scattered over a pen prepared expressly at the experimental ground at Columbia, the State university, and native cattle placed thereon. They contracted the disease and took the fever and died.

Q. What other experiments?

A. There were some experiments made there with regard to ticks. That was by my request. They were mashed by us and fed to the cattle, and the cattle took the fever and died. I think that's where

Salmon got the idea of the ticks—was in the discussion we had in Chicago in the fall of '91. May I state what that was?

Q. Yes; so ahead; we are after information.

208 A. We have what we call the United States Vet-rinary Medical Association, and I belong to that organization, and Mr. Salmon was there and objected to some of the experiments made at our station, and he went to the expense of procuring a very high-prices magic lantern, calcium light, magic light, and threw microscopic specimens on the wall. His theory was that the germ was identical to that, as near as can be ascertained, of ague in man. Of course, nobody disputed the cause of the germs, but where they came from—the origin of them. Of course, we know they are of vegetable origin. I heard some of the attorneys here yesterday speak about a parasite. It's not a parasite; it's a vegetable. He tried to convey to this association that it was a miasmic origin—that is, ague, due to miasmic causes, only indicated in miasmic districts, those Southern countries where frost is not sufficient to destroy it. The germs are found in Texas, in the infected area—found on the soil at all times of the year.

Q. What was the result of that meeting that you spoke of in Chicago?

A. Nothing more than it was simply his opinion—just one man out of a body.

Q. Have you had any other experiments in ascertaining the manner in which Texas fever was communicated?

A. No—well, there has been experiments made by Dr. Francis, of the station in Texas, and also Dr. Dinwiddie, of Arkansas, and the experiments they made were the same as made in our station in Missouri. It made no difference how these germs came to our uninfected soil just as they came there.

Q. I will ask you if it — possible for an experienced veterinary surgeon acquainted with the disease and having had experience with the disease known as Texas fever to determine from the appearance of an animal whether or not it is capable of communicating the disease known as Spanish or Texas fever to native cattle without knowing where it came from.

A. No. There's quite a number of Jersey cattle in Texas, and they will impart the disease just as quick as long-horns.

Q. Would it be possible for a non-expert or a man not educated in the veterinary profession to determine that an animal was or was not capable of communicating Texas fever to Northern cattle?

A. A veterinary surgeon couldn't determine unless he had a history as to where this animal came from. Then it would only — guess-work *work*. Of course, an expert microscopist could tell by examining the urine or manure. If he would find germs there, he would know the animal would communicate the disease.

Q. He would need a microscope?

A. Yes; and a high-power one.

Q. What is the appearance of these Southern cattle that will communicate disease as to being healthy or otherwise themselves?

A. They are perfectly healthy.

Q. You may state whether the Texas cattle, without regard to what portion of the State they are from, are capable of communicating this disease to Northern cattle, if you know.

A. You mean in the part of Texas outside of the quarantine limits?

Q. I speak of all Texas cattle coming from the State of Texas, no matter what portions of the State they come from—whether they are capable of communicating the disease.

A. It is considered by all the sanitary boards of the different States that west of that line there is no danger. That line is located far enough away out of the infected area so that it is supposed that there is really no danger right at the line.

209 Q. Do you know how far it is located from what is considered the absolutely dangerous locality or territory? Do you know the distance?

Plaintiff objected to the question. The objection was overruled by the court; to which plaintiff excepted.

A. Well, the sanitary boards from New Mexico, from this State, from Missouri, from Wyoming, and Illinois and Indiana were all there. I was there to represent Missouri, and all of these boards concluded, agreed, that this line was about right; that it was far enough west. In fact, they thought in some places it was further west than was necessary, and they are going to ask the Bureau of Animal Industry to move it farther east.

Q. I will ask you if you personally know that cattle coming from west of the line—that is, from certain sections west of that line—are incapable of communicating the disease.

A. No; only from what I learned from these sanitary boards.

Q. You never personally observed?

A. No, sir.

Q. Did I ask you if you knew anything about the tick theory; had heard it advanced before?

A. I believe I am the originator of the tick theory.

Q. Then you know what the Texas fever is?

A. There is no difference between a Texas tick and a Missouri tick. They are all the same tick.

Q. That is what I was going to get at.

A. The tick is just like a Texas steer. It don't make any difference whether he is in Ohio or Texas; he is still a Texas steer.

Q. So that there isn't any such thing as a distinct Texas fever tick, that exists only on cattle capable of communicating the disease?

A. Ticks are all the same. It doesn't make any difference where he is raised.

Q. So you couldn't tell, by seeing a tick on an animal, whether he was a Texas tick or a Missouri tick?

A. No.

Q. Then would the presence of the tick on an animal indicate that the animal was capable of communicating Texas fever?

A. That would depend altogether on where the animal came from.

Q. If he came from outside of the quarantine line as established by Rusk February 26th, '92, would it be any indication that the animal was capable of communicating the Texas fever?

A. No; not at all.

Cross-examination by Judge CUNNINGHAM:

Q. There is such a tick known to the reports and the books as a Texas cattle tick?

A. No; that's only one man's say-so.

Q. It is found in the reports?

A. Yes, sir.

Q. Isn't there such an "animal" known to the books as a Texas cattle tick?

A. No.

Q. Isn't there such an "animal" known to the books?

A. It may be in that book you have there. You get a book on insetcs and I'll show you it's the same tick.

Q. Isn't there such a tick known as the Texas cattle tick?

A. Well, now, I'll answer this. Ticks are all the same——

Q. Will you answer my question "yes" or "no"?

A. I'll answer it this way——

(By the COURT: Answer the question "yes" or "no.")

A. There is no difference in them.

By the COURT: That is not an answer to the question. Is there such a tick? Yes or no?

A. No; there isn't. A tick is a tick.

Q. You never heard of a Texas cattle tick?

A. If you would go to Texas, you would find Jersey cattle. Would you call it a Texas cow?

210 Q. I am talking about the Texas tick?

A. I don't know anything about the Texas tick.

Q. Then you never heard of a Texas tick before?

A. I understand what you call a Texas tick is a tick growing in Texas.

Q. I ask you whether or not there is not such an insect known in common parlance amongst ordinary men as a Texas cattle tick.

A. I know there is a tick.

Q. Isn't it ordinarily known as the Texas cattle tick?

A. Not necessarily. In Missouri we have them there.

Q. Isn't it ordinarily known as the Texas cattle tick?

A. No; just a tick.

Q. You never heard of a Texas cattle tick before?

A. I have heard you men call it a Texas cattle tick. That's all. That don't make it so.

Q. Have you never heard of it before you came here?

A. Not of the Texas cattle tick.

Q. Never did?

A. I have heard of ticks being on Texas cattle.

Q. You have read this report of the Department of Agriculture, Bureau of Animal Industry, on Texas fever?

A. I have scanned it.

Q. You haven't read it carefully?

A. No.

Q. You didn't see anything about the Texas cattle tick, did you?

A. No.

Q. So that you would be surprised to see it mentioned in here as a Texas cattle tick?

A. He might call it that, but that don't make it so.

Q. I am asking you whether or not it isn't talked about.

A. I know there is a tick.

By Mr. SEDGWICK:

Q. Cunningham wants to know if it is claimed that there is a distinct species of tick that exists only in Texas.

A. No; there is not a distinct species.

By Mr. SEDGWICK:

Q. He wants to know if it is claimed by anybody that there is.

By Judge CUNNINGHAM:

Q. No; that isn't what I want to know. I want to know if there isn't a tick known in common parlance as the Texas cattle tick.

By the COURT: You can answer that "yes or no."

A. Well, I answer it this way.

By the COURT: Don't answer it that way. Answer it "yes" or "no."

A. I know there is only but one tick.

By the COURT: Answer that question "yes" or "no;" is there or is there not?

A. I don't know whether there is or not.

Q. Now, Doctor, suppose you should see these ticks upon wild and undomesticated cattle with long horns that came from immediately outside of the quarantine line, would it raise in your mind any suspicion that they were dangerous cattle to introduce among our cattle?

Defendant railroad company objected to the question as assuming facts not in evidence. The objection was overruled by the court; to which defendant railroad company excepted.

A. It would not.

Q. Suppose such cattle from within the quarantine line, then what?

A. I don't think I would pay much attention to them. I never have.

Q. Who is Dr. Salmon?

A. He is a veterinary surgeon.

Q. What official position does he hold?

A. Chief veterinary of Animal Industry.

Q. Is he recognized as a good authority upon diseases of cattle?
A. Not any better than any other veterinary that has experience.

Q. Where he says, "It had long been believed by the cattle-
211 raisers of the West that Texas fever was caused by the ticks which were carried and scattered everywhere by the Southern cattle"?
A. He doesn't say that.
Q. Suppose he does?
A. He doesn't.
Q. Suppose he does?
A. Dr. Smith says that.
Q. How do you know that Dr. Salmon doesn't say that when his name is attached?
A. Because he doesn't believe in the tick theory.
Q. Is that the reason, because he doesn't believe in the tick theory?
A. He wants to make some little showing of what he is doing.
Q. He is lying about it?
A. I don't think he wrote it.
Q. It bears his signature?
A. It is printed.
Q. It's printed in the official report which he promulgates as one of the Bureau of Animal Industry?
A. Of course he fathers it, I suppose.
Q. When he says, "It had long been believed by the cattle-raisers of the West that Texas fever was caused by the ticks which were carried and scattered everywhere by the Southern cattle," what do you say about Dr. Salmon approving the theory?
A. It's simply a theory.
Q. You said he didn't approve it?
A. If he does he has changed his mind.
Q. Here he says, "Another significant discovery not less marvelous is that the micro-organism which constitutes the contagion of the disease is transmitted through the egg to the young tick, and it is this and not the adult tick carried by the Southern cattle which finds its way upon susceptible animals and causes the disease. In the absence of the tick the disease is probably not communicable except by artificial inoculation."
A. I say he didn't say that.
Q. It appears in his printed report.
A. Yes; but that isn't his signature.
Q. It appears there over his name, doesn't it, in this printed report?
A. That is his name there, but if you will look you will see that it ain't Dr. Salmon.
Q. Don't you know that this is a letter of Dr. Salmon's, transmitting this report of these veterinary surgeons with respect to the series of experiments carried on about Texas fever for the last four years? Don't you know that is a letter of transmittal?
A. No.
Q. Look at it and see if it is not.

A. I don't care anything about that letter.

Q. Doesn't it so appear?

A. I don't know whether he authorized them to put his name there or not.

Q. You say, in spite of what is down here, printed by the authority of Dr. Salmon, that the Doctor doesn't believe in the tick theory?

A. Yes; the last I talked to him I did believe in the tick theory, but he didn't.

Q. What do you mean by the "tick theory"?

A. I believe they can convey the germs of Texas fever in their bodies just the same as scarlet fever and small-pox can be carried through the United States mail on an envelope or a newspaper.

Q. Don't you think their presence is an indication that would warrant suspicion?

A. Not a bit more than I will send from this town a communication of small-pox to my family.

Q. Suppose you knew the letter came out of a small-pox family?

212 A. Then I would be afraid of it.

Q. Suppose you saw ticks upon a Texas steer that came from within the quarantine line?

A. I would not pay any attention to them, because there are other ways besides that of conveying the disease.

Q. How long since this theory has been advanced that this disease is carried by these Texas ticks?

A. I said awhile ago that I believe I was the man that put that question to the United States Medical Association.

Q. Now, tell us when.

A. When that?

Q. When did you originate the theory?

A. I say I had my suspicions on it and I spoke about it in the meeting of the United States Medical Association at Chicago.

Q. When was that?

A. The 21st day of September, '92.

Q. This report says, "In 1889 the first systematic experiments were made by the Bureau of Animal Industry, and these were at once fruitful in the discovery by one of us of a peculiar micro-organism in the red blood corpuscles, which corresponds in every respect with what we should expect as the true cause. At the same time the other showed by field experiments that the cattle tick was somehow necessary to the transmission of the disease." This report is official, and yet you first originated it in '91.

A. There were no experiments made until after that time.

Q. That report is a mistake, is it?

A. That report is made this year.

Q. They are mistaken, are they?

A. They are mistaken, according to Dr. Salmon.

Q. When they say they commenced these experiments in '89 with cattle collected from Craven county, North Carolina, they are mistaken about it?

A. Are they experimenting with ticks?
Q. They are mistaken, are they?
A. The report before that they don't say anything about that.
Q. The Texas tick was discovered by you?
A. I simply suggested it, I tell you. I am not an experimentalist. I am not employed for that purpose.
Q. When they commenced the second seried of experiments in '89 it was a mistake, was it—a myth?
A. I don't know what that was.
Q. They commenced experimenting about Texas ticks. For your enlightenment I will read you a little about experiment 3 in 1889: "Exposure to Southern cattle"——

Defendant railroad company objected to the attorney reading to the witness from the report.

A. That ain't a text-book.
Q. Wait. "For this experiment field 3 was chosen. It resembled field 1 in having a running stream and contained about three-eight-s of an acre. It was separated from field one by a lane 36 feet wide. The experiment was designed as a control to the others below, and in order to insure the same conditions in every respect one of each of the three lots of cattle was placed in it." This was in 1889. Were they mistaken about that at that time?

Defendant railroad company objected to the question. The objection was sustained; to which plaintiff excepted.

Q. Do you believe that "the investigations made by the Bureau of Animal Industry demonstrate that the ticks which adhere to animals from infected districts are the chief means of con-
213 veying the infection to the bodies of susceptible animals?"

Defendant railroad company objected to the question. The objection was overruled by the court; to which defendant railway company excepted.

A. I believe that is one way, but there are others ways.
Q. When Dr. Salmon says in this report that "the presence of small ticks on the skin, escutcheon, thighs, and udder is a very important sign in the hers north of the Texas fever line," you disagree with him?
A. Yes, sir.
Q. That they carry this disease with them you disagree with him?
A. Yes; because we have got them in Missouri having small ticks, and they don't take the disease.
Q. These experiments you conducted over there, you say, you brought the soil?
A. I didn't say I did.
Q. You were cognizant of that fact, you said.
A. Yes, sir.
Q. How do you know the eggs of cattle ticks were not contained in the soil that was brought?
A. How do you know that there is an egg in the tick?

Q. I never have seen one. I was assuming that you know what veterinarians usually do.

A. I don't believe they lay eggs.

Q. How do they propagate their species?

A. They bring forth the living tick without laying an egg.

Q. Do you know of any instance in the insect world where that is a fact?

A. Yes; quite a number of them.

Q. Tell us one insect.

A. Quite a number of them.

By the COURT: Give us one.

A. That's one of them. Ticks don't lay eggs.

Cross-examination by Judge BUCK:

Q. Doctor, I understood you to say, in answer to Mr. Sedgwick, that the mere fact that these ticks were discoverable in quantities upon the Southern Texas cattle brought from outside the quarantine line would indicate no dangerous character of the animals. Did you so answer?

A. Yes, sir.

Q. I further understood you to say that the presence of these ticks in quantities upon Southern cattle, Texas cattle, brought from inside the quarantine lines, would, of themselves, indicate no dangerous character of the animals. Was that correct?

A. No; you misunderstood me.

Q. Then I think you misunderstood Sedgwick.

A. I said I believed they would convey the disease, but there were other ways, besides the tick, of conveying the disease.

Q. Do you think a few miles from a line established by an order of the Bureau of Animal Industry, and do you want to be so understood by this jury, might indicate a line on the one side of which would be comparative safety, while on the other side would be comparative danger?

A. The Bureau has put that line there, thinking possibly two counties within the line are free from infection. They aim to put two counties in.

Q. Do you think that all the veterinaries in the world combined could draw a line where on the one side there was undoubtedly danger and on the other side of that line there was comparative safety?

A. No; it's just a guess line.

Cross-examination by DENNIS MADDEN:

Q. Isn't it a fact that there is a reasonable number of your profession that hold that these ticks are an indication that cattle
214 have this disease when they are from Southern countries?

A. I never heard it expounded until I came into this court-room.

Q. You never heard of it in any way, shape, or form?

A. Never until I throwed that bomb in there at Chicago. I had

noticed Texas fever coming into Missouri. I didn't know about the ticks bringing it in; but at this our experimental station they took large, full-grown ticks and fed them to cattle, and they sickened and died of Texas fever.

Q. You say you are an advocate and believer in the tick theory yourself?

A. Yes, sir.

Q. What is your theory about it?

A. My theory is that this germ—it is microscopic germ, of course—lives on the red corpuscles of the blood; it destroys their function of conveying oxygen to the tissues; the blood becomes aenemic; the animal dies, asphixiated; it matters not how we get the germ in there. The natural host is this disc of blood.

Q. How are these communicated to the native cattle?

A. By taking it in with their food.

Q. Isn't there any other way?

A. Inoculation. They have experimented at different experimental stations. Dr. Pequin, the State veterinary of Missouri, carried on a series of experiments at the experimental station, and he saved 85 per cent. of the cattle by inoculation. What I mean is this, like we are preserved from smallpox by vaccination.

Q. But where these ticks do infect the animal you believe they cause this Texas fever?

A. There is no question about that. You can see it plainly with a micropscope in the red corpuscles. I say they must take these in with their food. I believe if they eat a tick that has the germs of Texas fever in it that they will contract the disease and die with it.

Q. Can it get in any other way?

A. By the stomach; that's my theory.

Q. It goes through the stomach?

A. Yes, sir.

Q. Doesn't it affect the circulation?

A. Yes; its host is the red corpuscles.

Q. It affects the circulation, of course?

A. Certainly. It is a blood disease due to this micro-organism.

Q. It doesn't matter what way the germ gets into the circulation of the blood?

A. No.

Q. It might get in by other ways than through the stomach?

A. No; I don't think it can. I think if these germs are cultivated like they cultivate the germs of smallpox and inoculate susceptible cattle it gives them a certain per cent. of immunity. These experiments have been carried out.

Q. Haven't you seen native cattle affected with Texas fever that had ticks upon them?

A. Well, I have seen more that had no ticks on them.

Q. You have seen native cattle die of this disease that had ticks on them?

A. I don't pay any attention to that, because ticks are in our

country, in Missouri, and I can't tell the difference between a Missouri tick and a Texas tick or a North Carolina tick.

Q. Yet you have noticed animals that died of this disease that had ticks on them?

A. I never paid any attention to the ticks.

Q. Haven't you seen ticks?

A. Yes; I have had them on me.

Q. You never took the fever, did you?

A. I never did.

215 Q. When this report says, "The ticks come to maturity as fast as the eggs are laid on the ground, after the female has dropped them from the host, and begin to develope immediately," that's a mistake, is it?

A. I think so. They may develope in Washington, but they don't down in this country.

Q. Have you watched the operation of parturition?

A. I have seen the ticks.

Q. How many are born at a time?

A. You would have to have a microscope to count them. I never took the trouble to count them.

Q. You have seen them actually being born from the tick alive?

A. I didn't understand that question.

Q. Do you have much of this Texas fever in Missouri?

A. We have had a great deal of it.

Q. How much?

A. We are very fortunate this year. We haven't had an outbreak this year.

Q. So you have got a little rest?

A. I have been at it for the last eighteen years.

Redirect examination by Judge KELLOGG:

Q. In reference to this quarantine line that was established by the Government, did I understand you to say, in answer to Judge Buck's question, that this quarantine line was placed outside—further west and further north than what was deemed to be the actual danger line?

A. Yes, sir.

Q. And something was said about how far out it was, about two counties?

A. Yes, sir.

Q. What is the fact about that?

A. That's the way Dr. Salmon aims to do. He aims to put the quarantine line as far north as he possibly can and aims to get it about two to three counties.

EXHIBIT 6.

NOVEMBER 13, 1893.

Agreement by and between Hosier Bros., *on* one part, and the plaintiff and various defendants in case of Chas. Haber *vs.* Hosier Bros. *et al.*, of the other part.

Said suit to be dismissed with prejudice as to Hosier Bros. by the plaintiff and all cross-petitioners.

The receiver to be discharged and to disburse money in his hands as follows:

1. To the payment of the costs of suit remaining unpaid.

2. To the payment of 35 % of the claims of plaintiff and of defendants represented by Buck and Bruce and E. W. Cunningham and claims represented by L. B. Kellogg, other than the Brogans, and claims represented by Madden Bros. The amount of said claims to be determined as follows: Where the appraisement has been made by referees heretofore appointed in the action, such appraisement to be taken as the values thereof; where no appraisement has been made, unless the parties shall agree thereto, the value shall be ascertained by three persons to be appointed as follows: One person by Hosier Bros.. One by the other claimants they two to appoint a third—the decision of these referess to be final on questions of fact. Members of old commission barred.

The remainder to be paid to Thos. E. Tutt.

HOSIER BROS.
FARRINGTON AND LANTRY.
E. W. CUNNINGHAM.

216 THOS. E. TUTT,
By C. B. GRAVES,
His Attorney.
F. A. BROGAN,
Att'y for Defendants Brogans.

H. D. DICKSON was examined and testified as follows:

Q. What is this paper (indicating)?

A. Well, it is a paper that was drawn up as an agreement for a settlement between the Hozier Brothers and the plaintiff and cross-petitioners in this case.

Q. You heard Mr. Hozier's testimony this morning?

A. Yes.

Q. This is the paper he referred to?

A. Yes.

The paper indicated was marked Defendants' Exhibit 6 and was offered in evidence by defendant railroad company.

Plaintiff objected to the introduction of the paper as incompetent, irrelevant, and immaterial. The objection was sustained by the court; to which defendant railroad company excepted.

A. T. DREW was recalled by defendant company for further examination:

Q. You may explain to the jury the regular tariff rate to Bazaar and the amount paid.

A. $75 per standard car to Bazaar. Stable cars would take an additional rate of fifteen per cent.

Q. Was the rate paid by Hozier Brothers on a stable car or a standard car?

A. Stable car.

Q. What is the difference in the totals between the stable-car rate and the amount paid by Mr. Brogan at Hartford?

A. A difference of $2,227.25.

Q. Between the rate that he did pay and the tariff rate to Bazaar on a stable car?

A. Yes, sir.

Defendant railroad company here rested its case.

JOHN C. FURNASE, one of the witnesses who was absent when plaintiff was introducing his direct testimony, was called and examined by plaintiff.

Defendant railroad company objected to this testimony for the reason that the petition was not sufficient to constitute a cause of action against the defendant company; that there was a misjoinder and excess of parties defendant claiming affirmative relief against defendant company, and for the reason that defendant company on face of the pleadings was entitled to judgment thereon, and same objection as was made to deposition of defendant Baysinger. The objection was overruled by the court; to which defendant company excepted.

Q. Where do you live?

A. Live in Center township, Lyon county, Kansas.

Q. Did you hear about these Hozier cattle coming to Hartford on the train and being driven across to the Brogan ranch, in Chase county?

A. Yes, sir.

Q. Do you know the trail over which they were driven?

A. Yes—that is, the west end of the trail.

Q. Did you yourself have any animals that were pastured on that same trail over which they were driven?

A. Yes, sir.

Q. How many animals did you have exposed to the fever, provided they could communicate it?

A. 240.

Q. Did any of them die?

A. Yes, sir.

Q. How many?

A. Four.

Q. What were they?

A. I lost two cows and four steers.

Q. That made six in all?
A. Yes.
217 Q. These were your own individual animals?
A. The cows.
Q. The four cows were yours?
A. Two.
Q. Is that all you owned individually?
A. That's all I lost.
Q. What symptoms of the disease did they have?
A. A certain time after these cattle came through they became sick, kind of drooped, feverish; probably sick two days and died.
Q. Did you notice other animals of other people that died?
A. Yes, sir.
Q. Mention them.
A. Stotler's.
Q. Were those the same or different symptoms that these had?
A. The same. They were in the same herd.
Q. Are you a farmer and stock-raiser?
A. Yes, sir.
Q. Do you know the value of such animals as you lost—what they were worth?
A. I know what the balance brought.
Q. Don't you know what these were worth?
A. Yes, sir.
Q. What were these two cows that died worth?
A. Worth fifty dollars.
Q. Twenty-five each?
A. Yes, sir.
Q. Were they milch cows?
A. Yes, sir.
Q. Did you and Mr. Martindale have any animals at the same place that took sick at the same time?
A. Yes, sir.
Q. What were they?
A. Steers.
Q. How many died?
A. Four.
Q. What were they worth?
A. They would average about fifty-nine dollars a head; the balance did.
Q. Were they worth that?
A. Yes, sir.
Q. What time was it these died?
A. They died in August.
Q. August, '92?
A. Yes, sir.
Q. These four steers were worth fifty-nine dollars a head?
A. Forty-nine.
Q. Did you yourself have any animals that were taken sick with that disease and didn't die?

A. There were three steers that got sick, but they got well and were shipped—that is, they were shipped late.

Plaintiff offered in evidence the report from which Judge Cunningham read to the witness Dr. White.

Defendant railroad company objected to its introduction as incompetent, irrelevant, and immaterial. The objection was sustained; to which plaintiff excepted.

E. A. HOSIER was here recalled by defendant company for futher examination:

Q. I will ask you if the cattle shipped to Hartford were the cattle grazed on the Hosier Brothers ranch, in Pecos county, Texas.

A. Yes, sir.

Q. And were the cattle described in the affidavit of Camp Franks and George Hosier, dated June 1st, '92?

Plaintiff objected to the question. The objection was sustained by the court; to which defendant railroad company excepted.

Q. What is your brand?

A. Cross L on the left side and T 5 on the left hip. Regular ranch brand.

Q. I will ask you to state to the jury whether the cattle shipped by the Missouri, Kansas and Texas Railway Company had these particular brands on them.

A. No, sir.

Q. Did they have different brands?

A. Yes, sir.

Q. Can you describe all the brands?

A. No; I can't.

Q. I will ask you if you did not present the original affidavits, of which these are copies, to the live-stock sanitary commissioners.

218 A. Yes, sir.

Q. Are the cattle described in these affidavits the identical cattle shipped by the Missouri, Kansas and Texas Railway Company to Hartford?

Plaintiff objected to the question.

Q. Do you know whether or not the cattle described in these affidavits were the cattle raised on the ranch of Hozier Brothers and were the identical cattle shipped by the Missouri, Kansas and Texas Railroad Company to Hartford, Kansas?

A. I do not personally; no.

Q. Did you ship any cattle that did not belong to Hozier Brothers to Hartford, Kansas?

A. Well, when the cattle were sold by the receiver I found that some cattle had been sold that we never had shipped, that were not brought from our ranch, and the only way I could account for

it was that they were strays picked up on the route to Midland. The money is yet held for those cattle to go to the proper owners.

Defendant railroad company here rested.
And this was all the evidence given in the case.

219 And thereupon, the evidence being all in, the defendant The Missouri, Kansas & Texas Railway Company requested the court to give the jury the following special instructions, to wit:

(Title omitted.)

Instructions.

"GENTLEMEN OF THE JURY: In this case the plaintiff, Charles Haber, brings his action against the Missouri, Kansas and Texas Railway Company and others to recover the sum of $3,000.00 *dollars*, which he alleges in his petition is the amount of damage which he sustained by reason of the loss of certain of his cattle which he claims died of the disease known as Texas fever, and that said disease was communicated to his cattle by cattle from the State of Texas, which he alleges were transported into the State of Kansas by the Missouri, Kansas and Texas Railway Company, in violation of law, with the knowledge on the part of said railway company that said cattle so transported by it were inoculated with germs of Texas fever, and that if such fact was not known to the said railway company, its agents, servants, and employees, that by ordinary care and diligence such facts might have been known to it.

The defendant in its answer sets up a general denial of all the allegations of the plaintiff's petition. It further set up as a defense to the allegations of the plaintiff's petition the rules and regulations established by the Secretary of the Department of Agriculture, in accordance with power given him by the act of Congress of May 29th, 1894, entitled 'An act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals,' and subsequent acts of Congress upon the same subject supplemental or amendatory thereof. The defendant also relies upon certain permits which were issued to the owners of the cattle by the State board of live-stock sanitary commissioners, which are to the effect that said cattle might be brought into the State of Kansas over the lines of the Missouri, Kansas and Texas Railway Company; also that there is misjoinder, and that by reason of such misjoinder this court has no jurisdiction; also the further defense that this case has been settled or agreed to be settled between the claimant and Hosier Brothers, who, it is alleged in the petition of the plaintiff, are jointly liable with the defendant. To this answer reply has been filed by plaintiff denying all the allegations therein contained.

There is no controversy but what the rules of the Secretary of the Department of Agriculture were substantially complied with. There is no controversy but what the permits alleged in the answer

of the defendant were duly issued to Hosier Brothers, the owners of the cattle, by order of the State board of live-stock sanitary commissioners.

The law of Congress of May 29th, 1884, provides that it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of contagious diseases, and to certify such rules and regulations to the executive authority of each State and Territory and invite such authorities to co-operate with him in the execution and enforcement thereof. Said act further provides that the plans and methods of the Commissioner of Agriculture may be accepted by any State or Territory. It appears that the plans and methods of the Secretary of the Department of Agriculture were duly accepted by an act of the legislature of the State of Kansas entitled 'An act authorizing the live-stock sani-
220 tary commissioners to co-operate with the Federal authorities and accepting the provisions of an act of Congress to provide for the suppression of contagious diseases among domestic animals,' approved March 26th, 1884; and that since said time the said board of live-stock sanitary commissioners have been co-operating with the Federal authorities under the rules and regulations prescribed by the Department of Agriculture for the suppression and extirpation of diseases among domestic animals.

You are further instructed that by virtue of said law of Congress and by virtue of the act of the legislature of the State of Kansas of March 26th, 1884, to which your attention has been called, the rules and regulations adopted by the Department of Agriculture became a portion of the governing law of the State of Kansas upon this subject, and that under and by virtue of the act of Congress herein referred to the Secretary of the Department of Agriculture has the power to establish a quarantine line and to declare in what portion of the country pleuro-pneumonia and other contagious diseases exist, and that on February 26th, 1892, he established such quarantine line, and due notice thereof was given to all transportation companies in the United States, and such quarantine line under the act of the legislature herein referred to became the quarantine line of the State of Kansas.

You are further instructed that railroad companies or other transportation companies cannot refuse to receive cattle and transport them when originating north or west of the quarantine line as then established by the Department of Agriculture.

You are further instructed that the railroad companies or transportation companies cannot, when cattle are tendered them for shipment outside of the quarantine line, make any inquiry in regard to the health and condition of the cattle further than to disclose the fact that the cattle are apparently healthy and that they have been kept north and west of the quarantine line."

Which the court refused to do; to which action of the court in refusing to give said special instructions the defendant The Missouri, Kansas and Texas Railway Company at the time duly excepted; and thereupon the said defendant requested the court to instruct

the jury to find for the defendant The Missouri, Kansas and Texas Railway Company; which said instruction the said court refused to give; to which action of the court in refusing to give said instruction the defendant The Missouri, Kansas and Texas Railway Company at the time duly excepted; and thereupon the said defendant requested the court to give the jury the following special instructions, to wit:

"Before you can find for the plaintiff in this case you must find that the agents, servants, and employés of the defendant in charge of the trains bringing said cattle into Kansas had such knowledge of Texas cattle and the disease known as Texas fever that they could, in the ordinary discharge of their duties in handling said trains, have discovered the fact that such cattle were inoculated with fever and were liable to communicate the disease to native cattle; and if you find that the agents, servants, and employés of the defendant did not have such knowledge, or that such knowledge was not brought to the attention of the railway company, you will then find for the defendant company."

"If you find that the defendant company received the cattle at Denison, Texas, from a connecting carrier and transported the same in the ordinary way, and the only negligence of which
221 the plaintiff complained is that the employees of the defendant in handling the trains in which these cattle were carried did not discover that they were of a kind calculated to communicate Texas fever, and the railroad company was guilty of no improper conduct in carrying or handling said cattle by which the fever was communicated to the plaintiff's cattle and the cattle of the other complainants, you will then and in that case find for the defendant company."

"If you find from all the evidence in this case that the railroad company unloaded the cattle at the station of Hartford, as under its contract with Hozier Brothers it was bound to do, and that the fever was occasioned entirely by the driving of said cattle across the country from Hartford to the Brogan pasture at Bazaar, in that case you will find for the defendant company."

"You are further instructed that it is not presumed that the agents, servants, and employees of the defendant company had any knowledge of Texas cattle or the locality they are from or whether they are liable to communicate Texas fever or not, unless it is shown affirmatively that they had some special knowledge of the disease known as Texas fever, and if you find that the agents, servants, and employees had no such special knowledge, then you will find for the defendant company."

"If you find that the permits had been duly issued by the State board of live-stock sanitary commissioners to Hosier Brothers to bring these cattle into the State of Kansas over the lines of the Missouri, Kansas and Texas Railway Company, you will in that event find for the defendant company, unless you find that such permits were fraudulently obtained or issued and that the railroad company knew that fact, or unless you further find that the rail-

road company knew that the permits had been wrongfully or mistakenly issued."

Which the said court refused to do; to which action of the court in refusing to give the jury each of said special instructions the said Missouri, Kansas and Texas Railway Company at the time duly excepted; and thereupon the said defendant, The Missouri, Kansas and Texas Railway Company, requested the court to give to the jury the following special instructions, to wit:

"1. You are instructed that the shipment of the cattle in question over the defendant's road from Denison, Texas, to Hartford, Kansas, was an act of interstate commerce, and that, as to such shipment, the authority of the United States Government and its rules and regulations established by its Bureau of Animal Industry under the act of Congress creating such bureau are paramount to the authority of the State of Kansas, and, in case of a conflict between the rules and regulations of the United States and those of the State in relation to this cattle shipment, the State laws and regulations must give way.

"2. If you believe from the evidence that the defendant in good faith complied with the laws and regulations of the United States Government in regard to the shipment of the Hozier cattle, and had the regular permit from the Government inspector, then you will find for the defendant.

"3. If the permits from the General Government and the State live-stock sanitary commission were duly issued to Hosier Bros. and accepted by the R. R. Co. in good faith, and the shipments made thereunder by the railroad company without any actual knowledge that the Hosier cattle were capable of communicating the disease of Texas fever, you will find for the defendant, because under such circumstances the said permits furnished to the R. R. Co. complete protection."

222 Which the court refused to do; to which action of the court in refusing to give said special instructions the said Missouri, Kansas and Texas Railway Company at the time duly excepted; and thereupon the court instructed the jury as follows, to wit:

(Title omitted.)

Instructions of the Court.

1. It appears that Hosier Bros., defendants herein, in the spring of 1892, owned and controlled a ranch consisting of many thousands of acres in Pecos county, Texas, upon which were grazed and permitted to range unrestrained many thousand head of Texas cattle; that in April of said year the said Hosier Bros. entered into a contract with F. Brogan and Sons, of Hartford, Lyon county, Kansas, whereby said Brogans and Sons were to receive from said Hozier Bros. about 2,500 head of the said Texas cattle at some point in said Lyon county, to be by the Brogans taken to their ranch in Chase county, Kansas, and there grazed by them during the summer of 1892; that in compliance with the said agreement the said Hozier Bros.

caused to be shipped of said cattle from said Pecos county, Texas, over The Missouri, Kansas and Texas Railway, defendant, into Kansas in the spring and summer of 1892 about 2,500 head of the said Texas cattle, which cattle were delivered by the said defendant railway company at Hartford, Kansas, in its stock yards, to said Brogan and Sons and were by them driven through Lyon and Chase counties to their said range, in said Chase county, Kansas. These cattle the plaintiff herein and the said cross-petitioners herein, seeking to recover in this action against the said defendant railway company, allege communicated to the domestic cattle of the said plaintiff and the said cross-petitioners the Texas, splenic, or Spanish fever, and this action is brought and prosecuted to recover of said defendant railway company the damages which they allege they suffered by reason of the said Texas cattle communicating to their cattle the said Texas, splenic, or Spanish fever.

There are other defendants in the action than the said railway company from whom the plaintiff and the cross-petitioning defendants claim they are also entitled to recover damages, but the issue now submitted to you is only as to the liability of the defendant railway company to this plaintiff and said cross-petitioning defendants and the amount of such liability, if anything.

2. The defendant denies its liability to the plaintiff herein or to any of the cross-petitioners for any sum whatever.

3. The statute of Kansas provides that any persons or persons who shall drive, ship, or transport or cause to be driven, shipped, or transported into or through any county in the State any cattle liable to or capable of communicating Texas, sp-enic, or Spanish fever to any domestic cattle of this State shall be liable to any persons or persons injured thereby for all damages they may sustain by reason of the communication of said disease of Texas, splenic, or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction. The term "persons" in this law means corporations as well as natural persons.

4. The mere fact that the cattle of the plaintiff or those of any of the cross-petitioning defendants became sick and died from this disease imparted to them by cattle transported by the said defendant into Lyon or Chase counties is not sufficient to warrant a
223 finding against said defendant railway company. You must find from the evidence, first, that Texas cattle were, in fact, brought into this State. Of this there is no denial and you can consider that fact as established. Second, that the cattle of the plaintiff and each of the cross-petitioning defendants, who seek to recover herein against said railway because of the loss of cattle, became infected and died because of the disease imparted to them by such Texas cattle, and that such disease was Texas, splenic, or Spanish fever; and, third, that the officers, employees, or agents of the railway company, defendant, had knowledge that such Texas cattle transported by it to this State were liable to impart such disease to the native cattle of this State, or that they ought by the exercise of diligence and care to have known of the dangerous char-

acter of these cattle, and that they would or were liable to *to* impart said disease to the native cattle of this State.

5. The statute of this State makes the fact of bringing any cattle from south of the south line of Kansas, between the first day of February and the first day of December, *prima facie* evidence that such cattle were capable of communicating and liable to impart Texas, splenic, or Spanish fever, and that the person in charge of such cattle had full knowledge and notice of their ability to impart such disease to the native cattle.

6. It is claimed by the plaintiff and the cross-petitions of defendants that the presence of what is known as the Texas cattle tick on cattle recently brought from the southern portions of Texas indicates that such cattle are capable of and liable to impart the Texas fever to the native cattle of this State, and that these Hosier cattle had such ticks on them. If you find from the evidence that these Hosier cattle, brought from Pecos county, Texas, at the season they were brought, had upon them Texas cattle ticks, and were capable of or liable to communicate the Texas, splenic, or Spanish fever to domestic cattle in Kansas, it became the duty of the railroad company, its servants, agents, or employees, to exercise due care and caution to ascertain the presence of such ticks, and it was their duty to examine such cattle to ascertain whether or not they were present. They could not shut their eyes or fail to investigate and then claim that they were not aware of the dangerous character of these cattle. The railway company, defendant, is charged with the knowledge that a reasonable and fair examination and inquiry made by it, its employees and agents, would have imparted and with the knowledge of any fact which, by the exercise of ordinary care and diligence, it would have learned.

7. The defendant railway company set out in its answer certain so-called permits, issued by the live-stock sanitary commission of the State of Kansas, permitting the shipment of these cattle. The court instructs you that, even if the cattle therein described were the ones actually shipped by the company to Hartford, yet such permits would constitute no defense, as there is no warrant or authority in the law authorizing the issuance of any such permits, and, notwithstanding the issuance of such permits, the railway company would be liable the same as though they had not been issued, provided you should find they are liable at all.

8. You are further instructed that it is immaterial whether or not the Hozier Brothers had a contract with the defendant railroad company to bring these cattle from Midland, Texas. The fact that it did bring them from some point on its line of road south of the south line of Kansas makes it liable, provided it had knowledge, if such is the fact, of the dangerous character of these cattle,
224 or ought to have known it under the instructions heretofore given you.

9. It is the duty of any one in the pursuit of any lawful business to exercise due care and caution that others shall not be injured thereby; and while a common carrier, such as is the defendant railway company, is bound to accept for transportation any freight

tendered it which it may be lawful to carry, it must exercise due care and caution in doing this that it does not invade the rights of others, and it is not required to take for transportation or to transport any article forbidden by the law to be transported or the transportation of which will injure others, provided it can ascertain by due diligence that such articles is liable to injure or cause damage to those with whom it may come in contact during its transportation or at its destination.

10. If you find from the evidence that the defendant railway company is liable, then you will return a verdict in favor of the plaintiff, assessing his damages at the amount heretofore fixed by the arbitration commissioners, and you will also return a verdict in favor of each of the cross petitioning defendants who suffered damages by reason of the introduction of the Texas fever by the Hozier cattle in the amount fixed by said commissioners where the same has been fixed, and in the cases where such amount has not been so fixed, then in the amount you find such defendants ought to recover from the evidence.

11. The issues raised by the cross-petition of F. Brogan and Sons and Hozier Brothers are not submitted to you.

12. It is not necessary in order to enable the plaintiff and cross-petitioners to recover from the defendant railway company that said company, its agents or employees, should have actual knowledge that these cattle which it transported to Hartford were dangerous or liable to communicate to native cattle the Texas fever. It is sufficient to make defendant company liable if such agents and employees had reason to know that such cattle were dangerous, and could have known it by the exercise of ordinary care and diligence.

13. The burden of proof is upon the plaintiff and the cross-petitioners seeking to recover herein to establish their right to recover by a preponderance of the evidence.

14. By a preponderance of the evidence does not necessarily mean by the greater number of the witnesses, but by it is meant that degree or condition of the proof which, when considered in the light of all the testimony in the case, seems to be the most reasonable, the most consistent, and the most satisfactory.

15. You are the exclusive judges of the evidence, of its weight, and of the credibility of the witnesses, and in determining the credibility of the witnesses and in determining the credibility of a witness and the weight that you shall give his testimony you may properly take into consideration the interest of such witness, if any he may have, in the result of the action; his bias or prejudice, if any, for or against the party for or against whom such witness testifies; his powers of memory and of observation, his demeanor on the witness-stand, his intelligence, and the general reasonableness and consistency of his statements and any other facts or circumstances disclosed by the evidence which in your judgment adds to or detracts from the credibility of such witness.

W. A. RANDOLPH, *Judge*

To the giving of each of the above instructions the defendant railway company at the time excepted to each separately as the same was given, and also at the time excepted to said instructions as a whole.

And thereupon, after argument of counsel for both sides,
225 *and* the court was about to order the jury to retire, and presented them with verdicts to be signed, which said verdicts were in the handwriting of the attorneys for the claimants, even the amount having been inserted as allowed by referees; and thereupon the defendant railroad company objected to sending said prepared verdicts to the jury-room, for the reason that the same were printed forms, and that the necessary blanks, including the amount of each verdict, had been filled in by the attorneys for the claimants; which objection was by the court overruled; — which action of the court in overruling the said objection the said defendant railroad company at the time duly excepted; and thereupon the jury retired under charge of a sworn bailiff to consider of their verdicts, taking with them the verdicts prepared for them by the attorneys for the claimants and which had been objected to by the railway company; and thereafter said jury returned into open court their verdicts as follows, to wit:

(Title of case omitted.)

We, the jury in the above-entitled cause, do find for the plaintiff, Charles Haber, upon his petition and against said railway company, and assess his damages at the sum of $1,173.00.

B. W. JAY, *Foreman.*

And at the same time said jury returned the following verdict:

(Title omitted.)

We, the jury in the above-entitled cause, do find for the defendant George Atkinson upon his cross-petition and against said railway company, and assess his damages at the sum of $40.00.

B. W. JAY, *Foreman.*

And at the same time returned verdicts exactly like the above in form except as to amount in favor of the following-named parties, to wit:

S. C. Bixler, $18.00; Herman Bohm, 36.00; Joseph Bratt, 64.00; Adam Bitler, 224.00; Adolph Brier, 20.00; John Brier, 65.00; Hermann Brier, 123.00; Hannah Bowles, 151.00; John D. Bolton, 28.00; H. A. Boltz, 35.00; G. E. Bodine, 12.00; D. A. Baysinger, 22.00; V. G. Baysinger, 36.00; Winnie Baysinger, $21.00; John Bricker, 15.00; G. C. Bender, 40.00; C. N. Buck, 85.00; L. Y. Cooper, 373.00; G. T. Collins, 23.00; J. C. Cooley, 16.00; Mary Conway, 84.00; Carson and Osborn, 707.50; M. J. Collard, 143.00; Phillip Davis, 60.00; Elizabeth Davis, 65.00; Lawrence Dresher, 106.00; William Dunlop, 217.00; J. D. Dunn, 22.50; R. M. Elliott, 128.00; George Elliott, 40.00; John H. Ferran, 35.00; John C. Furnas, 50.00; Furnas and

Martindale, 196.00; E. Fuller, 25.00; Dietrich Fox, 117.00; R. Funk, 81.00; Farrington and Langtry, 19,325.08; Dr. J. H. Fuller, 70.00; D. H. Gard, 67.00; Henry Geiger, 322.00; Mrs. L. B. Hull, 25.00; Louis Heitzman, 60.00; Theodore Hurtig, 20.00; G. O. Hughes, 85.00; J. G. Hughes, 90.00; Isaac Hawbecker, 181.00; John Hicks, 25.00; H. H. Henry, 106.33; Owen Hughes, 60.00; John Hock, 391.00; Mrs. D. J. Hall, 18.00; Anna Hughes, 135.00; J. W. Hock, 55.00; John W. Hughes, 148.00; W. H. Hickox, 15.00; W. T. Hite, 80.00; James Hutton, 20.00; A. T. Johnston, 20.00; Amanda J. Jones, 82.00; Edward Jenkins, 113.00; Jane Jones, 518.00; H. C. Jackson, 3,099.25; S. F. Jones, 507.50; Michael Janker, 243.00; G. P. Jones, 247.00; W. B. Johns, 43.00; J. W. Ketcham, 391.00; Joseph Kuhlman, 227.00; Christ Kruger, 617.00; A. Kinne, 68.00; Lyons and Campbell Ranch Cattle Co., 3,514.14; John Langley, 118.00; D. J. Lewis, 90.00; Leitler Bros., 280.00; G. W. Lewis, 300.00; J. W. Montgomery, 3,055.40; John Maddox, 30.00; Alfred Marley, 40.00; Marshall Meal, 20.00; Mat. Maurin, 99.00; Henry Meeker, 15.00; A. Murphy, 29.00; Timothy Murphy, 20.00;
226 John Middaugh, 20.00; Mary McClelland, 20.00; P. McCormick, 20.00; David McKee, 32.00; Charles McKee, 20.00; L. L. McKee, 20.00; F. M. Nine, 88.00; J. W. Nurenberger, 22.50; William Nicholas, 30.00; Robert North, 60.00; L.W. Ostrum, 85.00; M. A. Pease, 75.00; George Parker, 20.00; John Patch, 770.00; John P. Perrien, 130.00; W. C. Phillips, 20.00; J. G. Rumford, 60.00; Wesley Roberts, 44.00; S. P. Reeser, 20.00; T. M. Robinson, 22.00; J. P. Rossillin, 70.00; H. R. Scoggins, 1,281.00; Mrs. Martha Smith, 40.00; John Scroeder, 170.00; D. S. Starr, 206.00; Harry Soule, 25.00; Guy Slead, 20.00; D. B. Stigner, 25.00; J. A. Stotler, 154.00; F. G. Soule, 115.00; Peter Schleisher, 229.00; Joseph Strutzel, 95.00; Matthew Swager, 85.00; Harry Stuttle, 49.00; Widow Smith, 40.00; C. W. Stotler, 52.00; John Stotler, 104.00; Alice Sternberger, 95.00; J. L. Stratton, 90.00; John Schisher, 17.00; A. G. Shepard, 25.00; J. F. Stratton, 275.00; H. A. Taylor, 12.00; J. A. Thompson, 20.00; George Terrill, 205.00; J. W. and J. C. Van Cleve, 336.00; Mary Westfall, 79.00; George Ward, 189.00; W. H. Watkins, 80.00; T. E. Welch, 175.00; Joseph Wagner, 150.00; G. E. Welch, 70.00; E. T. White, 256.00; Wright Brothers, 87.00; H. R. Williams, 20.00; A. A. Wilson, 20.00; W. H. Zinck, 12.00; P. C. Zinck, 30.00.

And whereupon the defendant the railway company objected to the court's receiving any of the verdicts from the jury upon the ground that there was a misjoinder and excess of parties defendant claiming affirmative relief in this cause and all of the issues could not be tried in this cause, and upon the further ground that the verdicts were already prepared, including the amounts, and were in the handwriting of the attorneys for the claimants; which objection the court overruled; to which ruling of the court in overruling said objection the defendant railway company at the time duly excepted, and said verdicts were received by the court and read, and the said jury at the same time made certain special findings of fact which had been requested by said railway company, and which

said special questions, with the answers thereto, are as follows, to wit:

(Title omitted.)

Special Questions.

Comes now The Missouri, Kansas and Texas Railway Company, one of the defendants in the above-entitled cause, and asks the court to require the jury to answer the following special questions and return same into court with their verdict in this cause:

1. Did the railroad company have any actual notice that these cattle or any of them were from the infected district of Texas?

Answer. No.

2. If you answer the above question "Yes," you may then state what agent, servant, or employee of the railroad company had such notice or knowledge.

Answer. ——.

3. Did any of the agents, servants, or employess of the railroad company having charge of the handling of the trains in which these cattle were carried have an information or knowledge concerning Texas or splenetic fever?

Answer. We don't know.

4. If you answer the above question "Yes," you may then state what agent, servant, or employee of the company had such information or knowledge.

Answer. ——.

5. Is it not a fact that Francis Brogan did understand by the contract with Hosier Brothers that he was to receive the cattle at either Hartford, Olpe, or Bazaar, as Hosier Brothers might elect?

Answer. Yes.

6. Was not the talk he had with Williams after he had made the contract with Hosier Brothers?

Answer. Yes.

7. What effort would have been necessary for the railroad company to make to ascertain that these cattle were not proper cattle to be shipped north, or that any of them had been in the infected area immediately prior to the shipment thereof?

227 Answer. They should make a thorough investigation.

8. Did not Hosier Brothers send two men with each train of cattle, and was it not the duty of such men to look after and care for the cattle?

Answer. Yes.

9. Did the trainmen or employees of the defendant in charge of the train have anything to do with the handling of the cattle or with the loading or unloading of them?

Answer. No.

10. Was it not the duty of the trainmen in charge of the train in which the Hosier Brothers cattle were shipped to simply look after the management and operation of the train?

Answer. Yes.

11. Is it not a fact that all the information given to the railroad

company by Hosier Brothers and by Francis Brogan was to the effect that said cattle were from Pecos county, Texas?

Answer. Yes.

12. Is it not a fact that by the rules and regulations of the Honorable Jeremiah M. Rusk, Secretary of the Department of Agriculture, establishing a quarantine line, Pecos county, Texas, was entirely west and outside of said line?

Answer. Yes; we suppose so.

13. What difference is there between a Texas cattle fever tick and any other kind of tick?

Answer. We don't know.

14. Is it not a fact that Texas fever can be communicated to native cattle by other means than the Texas cattle tick?

Answer. Yes.

15. Is it not a fact that cattle from north and west of the Government quarantine line are not supposed by the Bureau of Animal Industry to be inoculated with germs of Texas fever and are supposed to be incapable of communicating it to native cattle?

Answer. Yes; that's the supposition.

16. You may state the distance from Fort Worth to Midland, Texas.

Answer. 307 miles.

17. You may state the distance from Fort Worth to Denison.

Answer. 96 miles.

18. You may state the distance from Denison, Texas, to Hartford, Kansas.

Answer. 344 miles.

19. You may state the distance from Midland, Texas, to the north line of Pecos county, Texas.

Answer. We don't know.

20. Is it not a fact that the ranch and range of Hosier Brothers is located entirely within the boundaries of Pecos county, Texas?

Answer. The ranch is in Pecos county, Texas.

21. Is it not a fact that the Bureau of Animal Industry kept an inspector at Fort Worth, Texas, and one at Parsons, Kansas, whose duty it was to inspect all cattle shipped north over the lines of the railroad company through those places and to stop all cattle coming from inside of the quarantine line or infected area?

Answer. Yes.

22. Is it not a fact that said inspectors determined by the brands of cattle whether they are from north and west of the Government quarantine line?

Answer. Yes.

23. Is it not a fact that these cattle were branded with Hosier Brothers' brand?

Answer. The most of them.

24. Was not said brand registered in Pecos county, Texas?

Answer. We don't know.

25. Did not such brands indicate that said cattle were from west of the Government quarantine line?

Answer. Yes.

26. Is it not a fact that the railroad company delivered the cattle to Hosier Brothers at Hartford, and until after such delivery no Texas fever was communicated by them and no damage done to the plaintiff or any of the claimants suing under their cross-petit-ons?

228 Answer. Yes.

27. If you find that the cattle communicated Texas fever, is it not a fact that such fever was communicated by the drive across the country from Hartford to the Brogan pasture, in Chase county, and the placing of the cattle in such pasture?

Answer. Yes.

28. Who were the owners of these cattle at the time they were driven from Hartford to the Brogan pasture?

Answer. Hosier Bros.

29. Is it not a fact that Hosier Brothers, the owners of the cattle, by their agents, the Brogans, drove the cattle from Hartford to the Brogan pasture?

Answer. Yes; it is alleged so.

30. How many years have Hosier Brothers been shipping cattle from Pecos county, Texas?

Answer. Three years.

31. Did said cattle ever communicate Texas fever at any other time than the time of the shipment to Hosier Brothers at Hartford, Kansas?

Answer. We don't know.

32. Is it not a fact that the defendant The Missouri, Kansas and Texas Railway Company in its business of a common carrier transports cattle every year from Texas under the Government quarantine regulations?

Answer. Yes; we suppose so.

33. Does not the defendant The Missouri, Kansas and Texas Railway Company make all reasonable effort to fully comply with and observe all the quarantine regulations promulgated and put in force by the Secretary of the Department of Agriculture, and to observe all the rules and regulations put in force by the state board of live-stock sanitary commissioners of Kansas?

Answer. We don't know, but they had ought to.

34. Is it not a fact that of the cattle transported from the State of Texas over the lines of the Missouri, Kansas and Texas Railway Company that this is the only instance in which any contagious disease was communicated by said cattle?

Answer. We don't know of any other.

B. W. JAY, *Foreman.*

After the verdict of the jury was read Judge Cunningham, for plaintiff, asked the court to have the jury returned to find a verdict upon the claim of the Eureka Springs Cattle Company, the claim of Olson Brothers, and that of E. W. Everitt, as no verdict either for or against them had been returned.

Defendant railroad company objected to the allowance of plaintiff's request for the reason that the foreman of the jury had stated

that they intended to find against the Eureka Cattle Springs Company, Oleson Brothers, and Everitt.

Judge Cunningham then demanded that the jury be returned to find a verdict for those parties.

The jury requested that the stenographer should read the testimony of Lee Wright, with respect to the claim of the Eureka Cattle Springs Company, and requested that the depositions be read as to the claims of Oleson Brothers and Everitt.

Defendant railroad company objected to the reading of the evidence of Wright and to the reading of the depositions for the reason that the jury had already stated, through its foreman, that they intended to bring in a verdict against these claimants.

By the COURT, to the jury: I will ask you further, gentlemen of the jury, whether you brought in these four verdicts in blank, they being the verdicts with respect to Oleson Brothers, the
229 Eureka Cattle Springs Company, Everitt, and Ames, because you had forgotten the testimony or whether it was your intention to find against those parties in the case?

By the FOREMAN OF THE JURY, to the court: Well, in the Oleson case the little evidence we did have was the report of the commissioner. That spoke something about the cattle crossing the quarantine line, and we found against them simply on that ground. The other cases we didn't remember the evidence in regard to at all.

By the COURT: That was the reason you failed to find a verdict?

By the FOREMAN:

A. Yes, sir.

By the COURT:

Q. You say, as to Oleson Brothers, you intended to find against them?

A. Yes; I stated my reasons for that.

Judge Cunningham here offered to read to the jury the deposition of John L. Oleson.

Defendant railroad company objected to the deposition being read for the reason that it was incompetent, irrelevant, and immaterial; that he, being a cross-petitioner, had no right to prosecute the action, and for the further reason that the evidence had once been submitted to the jury, and that the foreman stated that from the recollection of the jury of the testimony they intended to find against the claimant Oleson.

The objection of the railroad company was overruled by the court; to which defendant railroad company excepted.

Judge Cunningham read the deposition to the jury.

Judge Cunningham offered to read to the jury the deposition of M. L. Oleson.

Defendant railroad company objected to this deposition being read upon the same ground that it objected to the reading of the deposition of John L. Oleson. The objection was overruled by the court; to which defendant railroad company excepted.

The deposition of M. L. Oleson was read to the jury.

Judge Cunningham offered to read to the jury the deposition of O. L. Oleson.

Defendant railroad company objected to the reading of the deposition of O. L. Oleson for the same reasons as were stated in the objection to the reading of the deposition of M. L. Oleson. The objection was overruled by the court; to which defendant railroad company excepted.

Plaintiff offered to have the testimony of Lee Wright read by the stenographer.

Defendant railroad company objected to the testimony of Wright being read for the same reasons as stated in the objection to the reading of the deposition of M. L. Oleson. The objection was overruled by the court; to which defendant railroad company excepted.

The testimony of Lee Wright was read to the jury.

Plaintiff offered to read to the jury the deposition of Everitt.

Defendant railroad company objected to the reading of this deposition for the same reasons as stated in the objection to the reading of the deposition of M. L. Oleson. The objection was overruled by the court; to which defendant railroad company excepted.

The deposition of Everitt was read to the jury.

The jury was sent out to find verdict as to claim of Eureka Springs Stock Co., Oleson Bros., and E. W. Everitt, and, after due time, returned into open court with their verdicts, which were read by the court, to wit: In the same form as that for George Atkinson, for Eureka Springs Cattle Co. for $150.00, for Oleson Brothers for $806.00, and for E. W. Everitt for $25.00.

By the COURT, to the jury: Now, gentlemen, with these
230 additional verdicts as returned by you, are these your verdicts in this case?

By the JURY:

A. They are.

By the COURT, to the jury:

Q. Are you still satisfied with them?

By the JURY:

A. We are.

And thereupon the defendant railway company filed its motion for judgment against the plaintiff and against each and all of the defendants claiming affirmative relief against it; which said motion is in words and figures as follows, to wit:

(Title omitted.)

Motion for Judgment.

Comes now the Missouri, Kansas and Texas Railway Company and moves the court for judgment in its favor, notwithstanding the

general verdict in favor of the plaintiff and the cross-petitioning defendants, for whom verdicts have been rendered, upon the ground:

1st. Upon the face of the pleadings this defendant is entitled to judgment.

2nd. That the answers returned by the jury to the special questions submitted by the defendants The Missouri, Kansas and Texas Railway Company entitled it to such judgment.

3rd. Upon other facts in the case not controverted, and also upon facts admitted, it is entitled to such judgment.

L. B. KELLOGG AND
T. N. SEDGWICK
Att'ys for Def't M., K. & T. R'y Co.

And within proper time the said defendant railway company filed its motion for a new trial, of which said motion the following is an exact copy, to wit:

(Title omitted.)

Motion for New Trial.

Comes the defendant The Missouri, Kansas and Texas Railway Company and moves the court to set aside the verdict rendered in the above cause in favor of the plaintiff, and also the several verdicts in favor of the cross-petti-oners and grant this defendant a new trial upon the grounds and for the following reasons, to wit:

1st. Irregularity on the part of the plaintiff and the several cross-petitioners, where this defendant was prevented from having a fair trial.

2nd. Irregularity on the part of the court, by which this defendant was prevented from having a fair trial.

3rd. Abuse of discretion on the part of the court, which operated to prevent this defendant from having a fair trial.

4th. Misconduct on the part of the plaintiff and the several cross-petitioners claiming affirmative relief against this defendant.

5th. Accident and surprise, which ordinary prudence could not have guarded against.

6th. Excessive damages, the amount of the verdicts being so large as to indicate that verdicts were rendered under the influence of passion or prejudice.

7th. Error in the assessment of the amount of recovery, the amount in each verdict being too large by the full amount thereof.

8th. That the verdicts nor any of them are supported or sustained by the evidence.

9th. That the verdicts are each and all of them contrary to the evidence.

231 10th. That the verdicts and each one and all of them are contrary to law.

11th. That there was error of law occurring at the trial and at the time excepted to by this defendant.

12th. Newly discovered evidence material for this defendant,

which it could not with reasonable diligence have discovered and produced at the trial.

13th. That there was an excess of parties and a misjoinder of plaintiff and the several cross-petitioners in this action, by reason whereof the court had acquired no jurisdiction in the case and has no jurisdiction to receive the said several verdicts nor to render any judgments thereon.

14th. That the special findings of the jury are inconsistent with and opposed to the general verdict in favor of the plaintiff and each of the cross-petitioners for whom they were rendered, and are inconsistent with and opposed to each other.

L. B. KELLOGG AND
T. N. SEDGWICK,
Att'ys for Def't M., K. & T. R'y Co.

And thereafter and on the 16th day of December, A. D. 1893, the above cause came on for hearing before the court, first, upon the motion for judgment in favor of the railway company, notwithstanding the general verdicts in favor of the claimants, and, after argument of counsel for both sides and due consideration by the court, the same was — the court overruled; to which ruling of the court in overruling the said motion for judgment the defendant railway company at the time duly excepted; and thereupon said cause came on for hearing upon the same day upon the motion of the defendant railway company for a new trial, and, after argument of counsel for both sides and due consideration by the court, the same was by the court overruled; to which ruling of the court in overruling said motion for a new trial the defendant railway company at the time duly excepted.

And thereupon, upon motion of the claimants for judgment, the court proceeded to render judgment in favor of the plaintiff and in favor of each of the defendants claiming affirmative relief against the railway company, except defendants Hosier Brothers and the defendants Brogans, for the amount of the verdict rendered by the jury and in favor of the plaintiff and in favor of each of the defendants claiming affirmative relief against the railway company respectively; to which action of the court in rendering said judgments the defendant railway company at the time duly excepted.

And thereupon the court gave the defendant railway company ninety (90) days in which to make and serve a case made upon the plaintiff and claimants herein recovering judgment, and gave said plaintiff and claimants herein recovering a judgment twenty (20) days in which to suggest amendments to said case made, the said case made to be settled within ten days upon three days' notice.

And thereupon and on the 28th day of December, 1893, after the jury had been discharged for the term, the plaintiff and claimants herein served upon L. B. Kellogg, one of the attorneys for the defendant The Missouri, Kansas and Texas Railway Company, the following notice, to wit:

(Title omitted.)

Whereas the referees appointed in this suit, after hearing evidence, awarded to J. W. Ketcham $391.00 for 27 head of cattle, but refused to allow him anything upon 20 other head, and re-
232 ferred his affidavit to said court; and whereas a stipulation was duly made with said railway company excepting his claim from the award of said referees; and whereas, upon the trial of this case, said J. W. Ketcham presented to said jury a special finding, which, with the answer thereto, is in these words:

"Is it not a fact that J. W. Ketcham, outside of the $391.00 allowed by the commissioners, *he* lost by this Texas fever—

7 four-year-old steers worth	$252 00
3 two-year-old steers worth	145 00
6 milk cows worth	120 00
In all	$417 00

If not, how much was he damaged?
Answer. Yes."

And whereas the jury, through inadvertance, simply awarded to him the amount allowed by said referee, $391.00, and said jury, by their foreman, did not sign said special finding further than to say Yes, to said question:

Now, therefore, said J. W. Ketcham moves the court, first, that said foreman be permitted to sign said special findings; and, second, that said J. W. Ketcham have said judgment heretofore rendered amended in his behalf, so that the amount which he recovers from said railway company shall be $808.00 instead of $391.00, as found by the general verdict.

J. JAY BUCK,
Attorney for Ketcham.

To T. N. Sedgwick and L. B. Kellogg, attorneys for said railway company:

Take notice that said J. W. Ketcham will, upon the aforesaid statement, offer proof of the facts therein and ask the court to allow said foreman of said jury to sign said special findings and ask the court to amend said special verdict as aforesaid.

J. JAY BUCK,
Attorney for Ketcham.

And thereupon and on the same day brought the foreman of said jury into court and asked permission of the court that he sign the special findings referred to in said motion, and that the verdict and judgment heretofore rendered in favor of claimant J. W. Ketcham for $391.00 be amended so as to make it a judgment for $808.00; to all of which the defendant railway company objected upon the ground and for the reason that the case had been closed; that the verdict of the jury had been returned for $391.00, and that there

was no evidence before the court going to show that the jury had made a mistake, and, as the jury was not before the court, they could not be polled as to the correctness of the amended verdict, and that all presumptions were in favor of the verdict as returned, and neither the foreman of the jury nor the court had any power or authority in law to change or make any corrections in the amount of the same; that is the same was wrong it should have been corrected on amotion for a new trial, which said motion had been heretofore overruled and disposed of by the court, all of which the court overruled; to which ruling of the court the defendant railway company at the time excepted; and thereupon the court permitted said B. W. Jay, foreman of the jury, to sign the special findings and to sign an amended verdict for $808.00; and upon motion of
233 the claimant J. W. Ketchem the court proceeded to amend the judgment heretofore rendered in his favor by increasing the sum and amount thereof from $391.00 to $808.00; to all of which defendant railway company at the time duly excepted.

And thereafter and on March 12th, 1894, the court made a further order extending the time in which to make and serve said case made upon the plaintiff and claimants herein; which said order is in words and figures as follows, to wit:

(Title omitted.)

For good cause shown to me, the time for making and serving a case made in the above-entitled cause is hereby extended for thirty (30) days from March 16th, 1894.

W. A. RANDOLPH, *Judge.*

Service of the above and foregoing case made acknowledged this 9th day of April, 1894.

E. W. CUNNINGHAM,
J. JAY BUCK,
MADDEN BROS.,
BUCK AND BRUCE,
Att'ys for Plaintiff and Claimants.

STATE OF KANSAS, } ss:
County of Lyon, }

And now, on this 1st day of May, A. D. 1894, came the above-named plaintiff, by E. W. Cunningham and J. Jay Buck, his attorney-, and came also the cross-petitioners, defendants claiming affirmative relief in the above cause against the Missouri, Kansas and Texas R'y Co., excepts defendants Brogan and Hosier Bros., by their att'ys, Buck and Bruce, E. W. Cunningham, and Madden Bros., and came also The Missouri, Kansas and Texas R'y Co., defendant in the above cause, by T. N. Sedgwick, its attorney, and the defendant The Missouri, Kansas and Texas Railway Company presents the above and foregoing as its case made in said cause and asks to have the same allowed and signed as such case made.

And it appearing to me that the above and foregoing case made

in the above cause was duly served upon the att'y for the plaintiff and each and all of the cross-petitioners recovering judgment in this cause against the Missouri, Kansas and Texas R'y Co. within the time given by the court in which to make and serve the same, and that the same was returned by said parties to the defendant The Missouri, Kansas and Texas R'y Co. within the time allowed by the court for suggesting amendments, and that the above and foregoing is agreed upon by the parties as true and correct, and upon examination I find that the above and foregoing sets forth the pleadings, motions, evidence, demurrer thereto, instructions asked and refused, instructions given, motions for judgment and for new trial, objections to evidence and its admission, all rulings of the court and exceptions thereto, and presents a true and correct case made, and the same is hereby allowed and signed as such.

It is hereby considered and ordered that the above and foregoing be, and the same is hereby, allowed as a true and correct case made in the above cause, and that the same is hereby signed by me as such, and the clerk of this court is hereby instructed to attest the same with his official signature and attach hereto the seal of this court and to file the same in his office with the papers and records in said cause.

In witness whereof I have hereunto set my hand the day and year last above written.

W. A. RANDOLPH,
Judge 5th Judicial District, State of Ks.

Attest: M. Q. STARR,
Clerk District Court, Lyon Co., Ks. [SEAL.]

234 And also, on the 8th day of October, 1894, there was filed in the office of the clerk of the supreme court of the State of Kansas a waiver of the issuance and service of summons in error, which is in words and figures as follows, to wit:

235 In the Supreme Court of the State of Kansas.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
against
CHARLES HABER, H. R. SCROGGINS, JANE JONES, E. T. WHITE; JAS. C. Farrington and C. J. Lantry, Partners as Farrington & Lantry; John P. Perrier, Dr. H. J. Fuller, H. A. Bolz, A. Murphy, D. J. Lewis, J. G. Hughes, Charles McKee, J. G. Rumford, Patrick McCormick, John Schroeder, R. Funk, Joseph Wagoner, Deitrich Fox, Mathias Maurin, Henry Merker, G. E. Bodine, Mary McClelland, Joseph Kuhlman, Joseph Bratt, D. S. Starr, L. W. Olstrom, F. G. Soule, Widow Smith, Mrs. L. B. Hull, Henry Giger, Louis Heitzman, Harry Stuttle, John Middaugh, Edward Jenkins, J. P. Rossillan, L. L. McKee, Christ Kruger, A. Kinne, W. H. Watkins, J. Dunn, Littler Brothers, John D. Bolton, Isaac Hawbekcer, Adam Bitler, T. M. Robinson, Matthew Sweiger, Joseph Stutzel, John Langley, Michael Janker, Harry Soule, John Hicks, S. P.

Reaser, A. G. Shepard, J. F. Stratton, John Stottler, C. W. Stottler, S. A. Stottler, M. J. Collard, Carson & Osborne, H. C. Jackson, W. H. Zink, P. C. Zink, T. E. Welch, George E. Welch, A. A. Wilson, J. A. Thompson, George Terrell, Guy Slead, D. B. Stigner, W. A. Pease, George Parker, Peter Schlisher, John Schlisher, Marshal Meal, J. N. Nurumburg, G. P. Jones, Theodore Hurtig, G. O. Hughes, W. T. White, W. H. Hickox, James Hutton, J. W. Hughes, J. W. Hock, John Hock, D. H. Gard, E. Fullen, George Elliott, R. M. Elliott, J. L. Stratton, Lawrence Dresher, Elizabeth Davis, J. C. Cooley, G. T. Collins, G. C. Bender, John Bricker, V. G. Baysinger, Winnie Baysinger, D. S. Baysinger, C. N. Buck, S. C. Bixler, Herman Brier, John Brier, Adolph Brier, W. B. Johns, Mary Westfall, Alice Stenberger, Amanda J. Jones, Mrs. V. J. Hale, Mary Conway, John Patch, John H. Ferren, Wm. Nicholas, H. R. Williams, J. W. Ketchem, H. A. Taylor, Timothy Murphy, David McKee, Robert North, Wesley Roberts, George Ward, L. Y. Cooper, Hannah Bowers, Herman Bohn, P. Montgomery; P. Montgomery, Acc't of J. W. Montgomery; A. T. Johnson, Alfred Marley, Anna Hughes, Otto Haber, Mrs. Martha Smith, W. C. Phillips, Philip Davis, John Maddox, Owen Hughes, J. J. Rumford, E. W. Everett, L. A. Wright, A. B. Holforty, L. B. Ames, S. F. Jones, Wm. Dunlay, F. M. Nine, L. O. Olson, John Furnas, Furnas & Martindale, J. W. Vancleave, J. C. Vancleave, Dr. Gunkle, S. F. Jones, W. F. Dunlop, George Ward, H. H. Henry, Eureka Springs Cattle Company, Dr. Conkle, August Richeidt, Defendants in Error.

We hereby enter the appearance of each and all of the defendants in error respectively in the above-entitled cause and waive the issuance and service of summons in error herein upon each defendant respectively.

J. JAY BUCK,
E. W. CUNNINGHAM,
Att'ys for All Defendants Except Wm. Dunlop, S. F. Jones, P. Montgomery, J. W. Montgomery, and Farrington & Lantry.
MADDEN BROS.,
Att'ys for Wm. Dunlop, S. F. Jones, P. Montgomery, J. W Montgomery, Farrington & Lantry, Defendants Above Named.

Endorsed: 10003. M., K. & T. R'y Co. *vs.* Chas. Haber *et al.* Waiver of summons in error. Filed Oct. 8th, 1894. C. J. Brown, clerk sup. court.

236 And afterwards, on the 5th day of March, 1896, the same being one of the regular judicial days of the January term, A. D. 1896, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Hon. David Martin, chief justice, and Hon. W. A. Johnston and Hon. S. H. Allen, associate justices, and C. J. Brown,

clerk of said court—the following proceeding, among others, was had and entered of record, as follows, to wit:

THE MISSOURI, KANSAS & TEXAS R'L'Y CO., Pl'ff in Error,
vs.
CHARLES HABER *et al.*, Def'ts in Error. } No. 10003.

This cause comes on to be heard on the petition in error and transcript of the record of the district court of Lyon county, and also comes on to be heard the motion of defendants in error to dismiss this cause, and thereupon, after oral argument by T. N. Sedgwick and L. B. Kellogg, for plaintiff in error, and by J. Jay Buck, Dennis Madden, and E. W. Cunningham, for defendants in error, said cause and motion are submitted on brief of counsel for both parties and taken under advisement by the court. Eugene Hagan, one of the attorneys for defendants in error, is allowed 10 days within which to serve and file additional brief, and plaintiff in error 5 days thereafter to serve and file reply brief.

237 And afterward, on the 11th day of April, 1896, the same being one of the regular judicial days of the January term, A. D. 1896, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Hon. David Martin, chief justice, and Hon. W. A. Johnston and Hon. S. H. Allen, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record, as follows, to wit:

MISSOURI, KANSAS & TEXAS R'L'Y CO., Plaintiff in Error,
vs.
CHARLES HABER and Others, Defendants in Error. } No. 10003.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be so modified as to reduce the judgment in favor of J. W. Ketchem to $391.00, and that in all other respects the judgment of that court stand affirmed. It is further ordered that the plaintiff in error pay the costs of this cause in this court, taxed at $—, and hereof let execution issue.

238 And also on the 11th day of April, 1896, there was filed in the office of the clerk of said supreme court the syllabus and opinion of the court, which is in words and figures as follows, to wit:

239 THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *vs.* CHARLES HABER and Others. } 10003.

Error from Lyon county; affirmed.

Syllabus by the Court, Allen, J.

1. The act of Congress of May 29, 1884, entitled "An act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals," does not in any manner repeal or nullify the various acts of the legislature of this State designed to protect domestic cattle against the introduction and communication of Texas, splenic, or Spanish fever.
2. There is no conflict between either the act of Congress above mentioned or the rules and regulations established by the Secretary of Agriculture thereunder and the laws of this State which prohibit the bringing into the State of cattle capable of communicating or liable to impart Texas, splenic, or Spanish fever. The act of Congress, the regulations prescribed by the Secretary, and the statutes of this State are all intended to operate concurrently and to prevent the spread of infectious and contagious diseases among domestic animals.
3. All persons injured by the shipping or driving into this State of cattle capable of communicating Texas, splenic, or Spanish fever may be joined as defendants in an action against the owner of the cattle communicating such disease for the purpose of recovering damages for the injuries so sustained and to subject such cattle to the lien for such damages created by the statute, and in such action the defendants sustaining such injuries and entitled to a lien on the same cattle may set up their causes of action and obtain judgments thereon, and the liens of all persons entitled to recover against the owner of the cattle may be adjusted in one action.
4. A railroad company acting in conjunction with the owner of cattle communicating such disease in bringing them into this State may also be joined as a defendant in such action, and all questions affecting its liability, not only to the plaintiff, but to each of the defendants, may be determined in the case.

All the justices concurring.
A true copy.
Attest:

____ ____,
Clerk Supreme Court.

240 THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
CHARLES HABER and Others. } 10003.

Error from Lyon county.

Statement.

Charles Haber, as plaintiff, brought suit in the district court of Chase county against E. A. Hosier and George D. Hosier, partners as Hosier Brothers; The Missouri, Kansas and Texas Railway Company; Francis Brogan, W. J. Brogan, and Joseph N. Brogan, partners as Brogan & Sons, and numerous other parties defendant, alleging that the plaintiff resided in Lyon county, and there kept and owned 49 head of healthy native cattle; that Hosier Brothers owned and kept in the State of Texas 2,300 head of wild, undomesticated Texas cattle, capable of communicating Texas, splenic, or Spanish fever to the native cattle of Kansas; that between April 1 and July 15, 1892, the defendants Hosier Brothers, The Missouri, Kansas & Texas Railway Company, and Brogan & Sons transported, drove, and brought said Texas cattle from a point in Texas south of the 37th parallel of north latitude into the State of Kansas, in violation of the act of the legislature of Kansas entitled "An act for the protection of cattle against contagious diseases" and acts amendatory thereof and supplementary thereto; that said cattle were transported to Hartford, Lyon county, Kansas, and thence driven through Lyon county into Chase county along the highway and upon the range and pasture where plaintiff's cattle were kept; that the defendants before named had knowledge and information that said Texas cattle were capable of imparting said disease to the domestic cattle of this State; that they did communicate
241 said disease to plaintiff's cattle, and thereby caused them to sicken and die, to his damage $2,500. A great number of other persons, who had also had cattle die from Texas fever imparted by the same herd of cattle, were joined as defendants. The petition alleges that the Texas cattle had been quarantined and afterward placed in possession of a receiver, who held them with the consent of all parties in interest. They were afterward sold by the receiver, and at the time of filing the amended petition he held the proceeds derived from the sale. The plaintiff claimed a lien on the funds in his hands for the amount of his loss, and asked judgment against Hosier Brothers, the railway company, and Brogan & Sons for the amount of his damages; that it be adjudged a lien on the funds in the receiver's hands and be satisfied out of the same. The other defendants are alleged to claim an interest in said fund because of losses of cattle sustained by them from the same cause. The defendants who had lost cattle from the same cause answered separately, stating a cause of action substantially similar to that of the plaintiff, and asking satisfaction of their claims out of the moneys in the hands of the receiver and for judgment against the same parties. The railway company moved the court to require the

plaintiff to make his petition more definite and certain by stating specifically what interest, if any, or connection with said cattle the railroad company had except that of a common carrier, and, second, by stating what, if any, interest, lien, or claim upon the funds in the hands of the receiver the railway company had. This motion was overruled. The railway company then answered, alleging in substance that it was incorporated under the laws of Kansas and engaged in the business of a common carrier of freight and passengers between different States; that it connected at Denison, Texas, with the Missouri, Kansas & Texas Railway Company of
242 Texas, a different corporation, and that said last-named railroad connected at Taylor, Texas, with the road of the Texas & Pacific Railway Company, another corporation operating a line of railroad extending westward from Ft. Worth through the town of Midland; that on April 26, 1892, Hosier Brothers entered into a written contract with the Texas & Pacific Railway Company to transport for them 744 head of cattle from Midland, Texas, to Hartford, Kansas, and on the next day made a further contract for like transportation of 644 more; that on June 10, 1892, said Hosier Brothers made a further contract with the said company for the transportation of 485 other cattle from and to the same places; that all of said cattle were loaded into the cars at Midland, Texas, furnished by the Texas & Pacific Railway Company; that there is no other railroad running into Hartford, Kansas, except that of the defendant; that the defendant received said cattle at Denison, Texas, as a connecting carrier in the same cars in which they were first loaded, and delivered the same to Hosier Brothers at their destination, as named in the contract with the Texas & Pacific Railway Company. It denied that it had anything whatever to do with driving the cattle from Hartford to the Brogan pasture in Chase county, and alleged that on February 26, 1892, the Secretary of the Department of Agriculture issued and served upon all the railroad companies of the United States, including the defendant company, his regulations concerning cattle transportation, a copy of which was attached to the answer; that the circular letter establishing such regulations was issued in accordance with section 7 of the act of Congress of May 9, 1884, entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases
243 among domestic animals;" and that said rules and regulations removed all restrictions from the transportation of cattle to and from any portion of the United States except that portion described in said regulations as the area in which the disease known as splenic or Southern fever exists among cattle; that Midland, Texas, the point from which said cattle were shipped, lies outside of the infected district as designated by the Secretary of Agriculture, and that said cattle had been kept in Pecos county since the first of December, 1891, and had not been east or south of the Government quarantine line; that before said cattle were received by the defendant company one Albert Dean, live-stock in-

spector of the Bureau of Animal Industry, acting under the authority of the Department of Agriculture of the United States, and also under the State board of live-stock sanitary commissioners of Kansas, issued to Hosier Brothers permits for the shipment of said cattle; that it had no notice or knowledge that said cattle were infected with Texas or splenic fever, or would communicate said disease, and that because of its relation to the public as a common carrier it was bound to receive and transport said cattle. There is no conflict in the testimony as to the essential facts. Hosier Brothers owned a large ranch in Pecos county, Texas, bordering on the Pecos river. The headquarters of the ranch, which was about 40 miles square, was on Independence creek, about six miles from the river. On this ranch they had a great number of cattle, which ranged freely over the country and sometimes crossed the river into Crockett and Valverde counties. The quarantine line established by the Secretary of Agriculture, as shown by the map and circular letter, runs along the Pecos river and on the east line of Pecos county. Midland, the station at which the cattle were loaded, is outside of the boundaries of the infected district as designated by the Secretary, but the line of the
244 Texas and Pacific railroad crosses into the infected district a short distance east from Midland, and the whole route over which the cattle were shipped thence to the south line of Kansas is included within the infected district. Although bills of lading in the usual form were issued by the Texas & Pacific Railway Company, the contract for the shipment of the cattle was made by E. A. Hosier with the agents of the Missouri, Kansas & Texas Railway Company at Kansas City, Missouri, at a rate below the usual rate. The business was sought after by the agents of the company. They were informed that the cattle were being shipped from Texas to Kansas for the purpose of being pastured in a large pasture owned by Brogan in Chase county; that it was distant about 20 miles from Hartford; that it would be necessary to drive the cattle across the country from Hartford in order to reach the pasture; that the pasture was much nearer to Bazaar, a station on the Atchison, Topeka & Santa Fe railroad, than to Hartford; and in order to secure the business a rate of $10 less per car was made on the shipment. A contract for pasturing the cattle had been made by Hosiers with Brogans, under which Brogans agreed to receive the cattle either at Hartford, Olpe, or Bazaar. It was claimed on the trial by Brogan that the railway company agreed to pay him for driving the cattle from Hartford to his ranch in consideration of his aiding the company in securing the shipment over its road instead of the Santa Fe. The cattle were shipped as stated in the pleadings, were received by Hosier at Hartford and driven under the directions of Brogan thence to his Chase County ranch. In July cattle along the route over which they were driven began to show symptoms of Texas fever, and thereafter great numbers of them died. A number of separate actions were brought in Chase and Lyon counties, which were all consolidated, and by stipulation the whole matter
245 was removed to Lyon county, and the case of the plaintiff and of all cross-petitioning defendants against the railway

company alone was tried together, the action as against Hosier Brothers and Brogan & Sons having been continued to a subsequent term. The jury brought in verdicts in favor of the plaintiff and also of all cross-petitioning defendants, and on these verdicts judgments were rendered in favor of the plaintiff for $1,173 and in favor of 145 defendants against the company in amounts ranging from $12 to $19,325.08. Answers to special questions submitted at the request of the railroad company were also returned, among which are the following:

No. 1. Did the railroad company have any actual notice that these cattle or any of them were from the infected district of Texas?

A. No.

No. 3. Did any of the agents, servants, or employees of the railroad company having charge of the handling of the trains in which these cattle were carried have any information or knowledge concerning Texas or splenetic fever?

A. We do not know.

No. 8. Did not Hosier Brothers send two men with each train of cattle, and was it not the duty of such men to look after and care for the cattle?

A. Yes.

No. 9. Did the trainmen or employees of the defendant in charge of the trains have anything to do with the handling of the cattle or with the loading or unloading of them?

A. No.

No. 10. Was it not the duty of the trainmen in charge of the train in which the Hosier Brothers' cattle were shipped to simply look after the management and operation of the train?

246 A. Yes.

No. 11. Is it not a fact that all the information given to the railroad company by Hosier Brothers and by Francis Brogan was to the effect that said cattle were from Pecos county, Texas?

A. Yes.

No. 12. Is it not a fact that by the rules and regulations of the Hon. Jeremiah M. Rusk, Secretary of the Department of Agriculture, establishing a quarantine line, Pecos county, Texas, was entirely west and outside of said line?

A. Yes; we suppose so.

No. 15. Is it not a fact that cattle from north and west of the Government quarantine line are not supposed by the Bureau of Animal Industry to be inoculated with germs of Texas fever, and are supposed to be incapable of communicating it to native cattle?

A. Yes; that is the supposition.

No. 26. Is it not a fact that the railroad company delivered the cattle to Hosier Brothers at Hartford, and until after such delivery no Texas fever was communicated by them and no damage done to the plaintiff or any of the claimants suing under their cross-petitions?

A. Yes.

No. 27. If you find that the cattle communicated Texas fever, is it not a fact that such fever was communicated by the drive across

the country from Hartford to the Brogan pasture, in Chase county, and the placing of the cattle in such pasture?

A. Yes.

No. 29. Is it not a fact that Hosier Brothers, the owners of the cattle, by their agents, the Brogans, drove the cattle from Hartford to the Brogan pasture?

A. Yes; it is alleged so.

Motions were made by the railway company for judgment in its favor on the special findings of the jury and also for a new trial, both of which were overruled. The railway company brings the case to this court for review.

247 MISSOURI, KANSAS & TEXAS RAILWAY COMPANY } 10003.
vs.
CHARLES HABER and Others.

Error from Lyon county affirmed.

The opinion of the court was delivered by ALLEN, J.:

The main contention of counsel for the plaintiff in error is that this was an interstate shipment of cattle; that the company's connection with the whole matter was that only of a common carrier; that it complied with all the regulations prescribed by the Department of Agriculture under the act of Congress; that the Federal statute and the regulations established by the Secretary of Agriculture under it is the supreme law, and in effect repeals all provisions of the laws of Kansas in any manner conflicting therewith; that the company was bound as a carrier to receive and transport the cattle because they were loaded at a point without the quarantine line established by the Secretary, and the shippers were furnished with a permit issued in accordance with the regulations governing such shipments; that it delivered them to the owners at their destination; that no injury resulted to any one from the cattle while in the railroad company's charge, and that no culpable conduct on their part is shown to have contributed to the plaintiff's loss. The conclusions we have reached render it unnecessary to consider how far Congress, by acts passed for the regulation of interstate commerce, could go in curtailing the power of the legislature of this State to protect its citizens from the introduction of infectious or contagious diseases dangerous to their health or destructive of their property. The first question to con-
248 sider is whether there is really any conflict between the act of Congress and the State statute on which the plaintiff's cause of action is based. Section 3 of chapter 201 of the Laws of 1891 reads as follows: "Any person or persons who shall drive, ship, or transport, or cause to be shipped, driven, or transported into or through any county in this State any cattle liable or capable of communicating Texas, splenic, or Spanish fever to any domestic cattle of this State, shall be liable to any person or persons injured thereby for all damages that they may sustain by reason of the com-

munication of said disease of Texas, splenic, or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction, and the parties so injured shall have a first and prior lien to all other liens for such damages on the cattle communicating the disease of Texas, splenic, or Spanish fever." By the 4th section of the same chapter it is provided that proof that the cattle were brought into this State from the south of the 37th parallel of north latitude shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offense was committed, capable of communicating Texas, splenic, or Spanish fever, and that the owner or person in charge of such cattle had full knowledge thereof. It is further provided in the last-mentioned section that if it is shown that the cattle have been kept since the first day of December of the previous year west of the 22nd meridian of longitude from Washington and north of the 34th parallel of north latitude, the provisions of the section shall not apply. Section 3, above quoted, contains in substance the provisions of section 7, chapter 161, of the Laws of 1881, which by its terms includes only persons driving or causing to be driven such cattle into or through a county in this State, while section 3 includes persons shipping or transporting, as well as driving such cattle. In March, 1884, an act was passed by the legislature of the State entitled "An act for the protection of domestic animals," which provided for the appointment of a live-stock sanitary commission and was designed to prevent the spread of contagious disease among domestic animals within the State.

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On May 29 of the same year the act of Congress entitled "An act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals," took effect and appears as chapter 60, volume 23, U. S. Statutes at Large. The only sections of the act we deem it necessary to quote are as follows:

SEC. 3. "That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to co-operate in the execution and enforcement of this act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State of Territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a State or other properly constituted authorities, signify their readiness to co-operate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act

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as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another."

SEC. 6. "That no railroad company within the United States, or the owners or masters of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia: Provided, that the so-called splenetic or Texas fever shall not be considered a contagious, infectious or communicable disease within the meaning of sections four, five, six and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto."

SEC. 7. "That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of
251 any railroad, steamboat or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

It clearly appears from section 3, above quoted, that Congress did not cast on the Secretary of Agriculture and those acting under him the entire responsibility of preventing the spread of contagious diseases among domestic animals. It expressly recognized the right of the States to pass laws and prescribe rules and regulations for that purpose, and authorized the expenditure of the money appropriated by Congress for the purpose stated in the act whenever the governor of a State or other properly constituted authorities signified their readiness to co-operate with the Department of Agriculture. Not only is there an absence of permission to transport domestic animals capable of communicating an infectious or contagious disease from one place to another under any authority what-

ever, with a single exception hereinafter mentioned, but the first clause of section 6 expressly prohibits any railroad company from transporting from one State or Territory to another any live stock affected with any communicable disease. The last clause of this section expressly recognizes the existence of such a disease as splenetic or Texas fever, but exempts cattle
252 affected with it from the provisions of the act when being transported by rail to market for slaughter when the same are unloaded only for the purpose of feeding and watering on the way. The grant of permission to transport to market for slaughter emphasizes the prohibition contained in the preceding portion of the section against the transportation for other purposes of cattle capable of communicating the disease. It clearly was not the purpose of Congress to authorize cattle capable of imparting Texas fever to be brought into Kansas and communicate the disease to the domestic herds of this State. On the other hand, this section explicitly prohibits the company from doing so. Section 7 makes it the duty of the Commissioner of Agriculture to give notice to railroad companies doing business through any infected locality of the existence of the contagion, and imposes penalties for the violation of the act. This requirement of notice does not abrogate any of the other provisions of the act; nor does it in any manner affect the validity of the laws of this State on the subject.

It seems entirely clear to us that in the passage of this act Congress exercised its power to regulate commerce between the States in aid of the States in their efforts to prevent the spread of diseases among domestic animals and to assure purchasers of animals exported from this country for slaughter of their healthful condition. There is nothing whatever in the act prohibiting the States from enacting and enforcing regulations to extirpate and prevent the spread of contagious diseases, but, on the contrary, the States are in effect asked to be more active and vigilant in their efforts in that direction. The validity of the statutes of this State passed for the protection of domestic cattle against Texas or splenic fever has been considered by this court and upheld. Pattee *vs.* Adams, 37 Kan., 133; Mo. Pac. R'y Co. *vs.* Finley, 38 Kan., 550. The case of
253 Railway Company *vs.* Hefley, 158 U. S., 98, so much relied on by counsel for plaintiff in error, does not seem to us to have any bearing. It relates to a statute of Texas on the subject of freight rates and is entirely foreign to the question now under consideration. The case of R. R. Co. *vs.* Husen, 95 U. S., 465, also cited, has more bearing. It holds a law of Missouri absolutely prohibiting the bringing into the State of Texas Mexican or Indian cattle between the first day of March and the first day of November in each year, unless kept in the State the entire previous winter, to be an unwarranted restriction on interstate commerce, because it does not purport to be a police regulation merely to prevent the introduction of contagious or infectious diseases, but prevents the importation of such cattle, however healthy. It was said in the opinion in that case, in speaking of the power of the State: "It may exclude from its limits convicts, paupers, idiots and lunatics, and

persons likely to become a public charge, as well as persons afflicted by contageous or infectious diseases, a right founded, as intimated in the Passenger Cases, 7 How., 283, by Mr. Justice Grier in the sacred law of self-defence. *Vide* 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contageous or infectious diseases." The case of Kimmish *vs.* Ball, 129 U. S., 217, is very closely in point. It is there held that "section 4059 of the Code of Iowa, which provides that a person having in his possession Texas cattle shall be liable for any damages which may accrue from allowing them to run at large, and thereby spread the disease known as the Texas fever, is not in conflict with the commerce clause of the Constitution of the United States, nor is it a denial to citizens of other States of any rights
254 and privileges which are accorded to citizens of Iowa, and thus in conflict with subdivision 1 of section 2 of article 4 of the Constitution, relating to the privileges and immunities of the citizens of the several States." Although that case arose after the passage of the act of Congress we are now considering, it does not seem to have been contended that there was any conflict between the act of Congress and the Iowa statute. In the opinion it was said: "The case is therefore reduced to this, whether the State may not provide that whoever permits diseased cattle in his possession to run at large within its limits shall be liable for any damages caused by the spread of the disease occasioned thereby, and upon that we do not entertain the slightest doubt. Our answer, therefore, to the first question upon which the judges below differed is in the negative, that the motion in question is not unconstitutional by reason of any conflict with the commercial clause of the Constitution."

2. It is insisted that, even though the statute be held valid, the facts in this case do not warrant a recovery against the railroad company, because the introduction of the cattle into the State was rather the act of Hosier Brothers than of the company; that it received the cattle from a connecting carrier, with waybills showing that the cattle were loaded outside of the infected district and furnished with inspectors' certificates of their healthful condition; that it delivered them to the owners at the destination named, and had no connection whatever with the drive to the Brogan pasture, in Chase county. The responsibility of a carrier bringing into this State the germs of contagion which destroy the property of great numbers of the citizens of the State is not so easily evaded or shifted to the shoulders of owners or other persons taking part in the shipment. Complaint is made of the ruling of the court excluding
255 certain permits, as well as the circular issued by the Secretary of Agriculture, containing a notice that a disease known as splenic or southern fever exists among cattle within the area therein described, and prohibiting the transportation of cattle from said area to any other portion of the United States, except for certain purposes and under certain regulations therein prescribed, not

applicable to this case, and also of the instructions of the court in reference thereto. The permits referred to were issued by Albert Dean, inspector at Kansas City, Kansas, and purport to be by order of the live-stock sanitary commission. One of them authorized the shipment by the defendant to Hartford, Kansas, of 1,501 head of cattle consigned to Hosier Brothers. The only description of the cattle contained in it is: "Said cattle are shown by affidavit in this office to have been from Pecos county, Texas. These cattle are branded **t 3** and other brands." The other is in substantially the same language, authorizing the shipment of 500 head. It is not necessary to determine what protection a certificate issued by an inspector who had actually inspected the cattle, describing them so that they could be identified, might afford the railroad company or owner of the cattle in a criminal prosecution or any other action where the matter of good faith on the part of the person acting under the certificate might be in issue. It is not claimed that the inspector had ever seen the cattle or had any personal knowledge whatever in regard to them. The permits show that they were based on affidavit, and the description of the cattle given in them is altogether insufficient to identify them. The circular issued by the Secretary of Agriculture, which was excluded, contains nothing tending to relieve the company from liability. So far as showing the boundaries of the infected district, the map issued by the
256 Secretary, which was admitted in evidence, answered the same purpose as the circular. The board of live-stock sanitary commissioners doubtless has power to establish and enforce quarantine regulations within this State, but such regulations could not have the effect to practically annul chapter 201 of the Laws of 1891, passed 7 years after the act creating the live-stock sanitary commission. The Secretary of Agriculture could not and had not attempted to defeat or break the force of the act of Congress under consideration, but his acts, so far as they are shown by the evidence in the case, have been directed to prevent the spread of the disease, not to facilitate it.

The evidence in the case clearly shows that the representatives of the company were fully informed of the fact that the cattle came from Pecos county, Texas, which is not only south of the south line of Kansas, but south of the thirty-fourth parallel of north latitude. A glance at the map would have disclosed the fact that Pecos county extends to the boundary of the infected district as designated by the Secretary of Agriculture, and would also have shown that the boundary marked out by him, which extends east and west along the north boundary of Crockett county, turns when it strikes the Pecos river and runs south and east, following the course of the river. The evidence shows that these cattle were kept on a large ranch, having the Pecos river for its boundary; that it was not enclosed with any fence, and that the cattle could and did range across the river into Valverde and Crockett counties, included in what the Secretary recognized as the infected district. The statutes of this State prohibit the introduction not of all Texas cattle, as the statute of Missouri did, but of all cattle capable of imparting the Texas or

splenic fever, and provides that the fact that such cattle are
257 brought into this State from south of the 37th parallel of north latitude between the first of February and the first of December shall be taken as *prima facie* proof that they are capable of imparting such fever. The cattle were in fact capable of communicating the Texas or splenic fever. They did communicate it. They did spread it so as to infect and destroy great numbers out of the domestic herds in Chase and Lyon counties. The company's agents knew before they made the contract with Hosier Brothers that the cattle were to be driven from Hartford to Brogans' ranch. They brought the infected cattle into the State, to the station of Hartford, fully cognizant of the purpose of Hosier Brothers and Brogans, and did knowingly aid them in carrying out that purpose. They are responsible for all the direct consequences that have ensued therefrom. They acted not only in direct violation of the statutes, which have been found by long and bitter experience to be so essential to the protection of the domestic cattle of the State, but they acted in direct violation of section 6 of the act of Congress before quoted. The regulations established by the Secretary of Agriculture contain nothing tending to exempt the company from liability, and the Secretary had no power under the act of Congress to make any regulations which would have the effect to abrogate in any degree the statutes of this State. The permits offered in evidence afford no protection to the company, and the court did not err in excluding them.

The evidence shows that ticks, which are regarded as a strong if not absolutely certain indication that the cattle are capable of communicating the disease, were plainly and easily discernible on many of the cattle; that they were visible to the naked eye, and were seen by witnesses who observed the cattle at Ft. Worth and at Parsons. Even if this were an action at common law for negli-
258 gently spreading the disease, in view of the now generally known fact that the disease of Texas *of* splenic fever may be communicated to the domestic cattle of Kansas by Texas cattle and of the legislation in this and neighboring States and by Congress recognizing the existence of the disease, a very strong case is made by the testimony against the company.

We find no inconsistency between the special findings and general verdict of the jury. We think the instructions were eminently fair, if not even more favorable than the law is toward the railroad company. They were told in the 4th instruction that they must find from the evidence that Texas cattle were brought into the State by the defendant; that the cattle of the plaintiff and the cross-petitioning defendants became infected by the disease imparted to them by such Texas cattle, and that such disease was Texas, splenic, or Spanish fever, and "that the officers, employees, or agents of the railway company defendant had knowledge that such Texas cattle transported by it to this State were liable to impart such disease to the native cattle of this State or that they ought by the exercise of diligence and care to have known of the dangerous character of these cattle, and that they would or were liable to impart said dis-

ease to the native cattle of this State." There is nothing in the instructions conflicting with the portion of the charge above quoted. Under this no harsh rule requiring the company to act at its peril with reference to the shipment was declared, but the jury were told that it would only be liable in case its representatives failed to exercise care and diligence to ascertain whether the cattle were liable to impart the disease or not. Though presented by counsel in various forms, what we have said in disposing of the main contention also answers the substance of the various claims with reference to the merits of the case.

259 3. A question of practice which at first may seem serious is presented by the record. The suit was brought against Hosier Brothers, Brogan & Sons, and the railway company, against all of whom a recovery was sought as joint wrongdoers acting in concert in bringing in the cattle in violation of the statute. It is alleged that the cattle belonged to Hosier Brothers, and the plaintiff claimed a lien on them under the provisions of the statute. 145 parties defendant, who had also suffered loss from the same cause, and who also claimed a lien on the same cattle for their damages, were joined as parties defendant. They answered, setting up causes of action against the same parties on the same grounds, and in all respects similar to the cause of action stated in the plaintiff's petition. The plaintiff's case and the cross-demands of all these defendants who claimed affirmative relief were tried together, and 146 different verdicts were rendered against the railway company by the same jury. It is contended that this could not lawfully be done. There was no demurrer by the railway company on the ground of a misjoinder of causes of action, nor was there any request for a separate jury to try the issues between the railroad company and each cross-petitioning defendant. The question was raised by motion to dismiss the petition and also the cross-petitions on the ground that there was an excess of parties, and objections were interposed to the evidence on the same ground. Section 36 of the code provides: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of the question involved therein." Section 83 provides: "The plaintiff may unite several causes of action in the same petition whether

260 they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of either one of the following classes:

First. The same transaction or transactions connected with the same subject of action.

Third. Injuries, with or without force, to person and property, or either. * * * But the causes of action so united must *must* all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens."

Section 3 of chapter 201 of the Laws of 1891 gives to the parties injured by reason of the communication of Texas, splenic, or Spanish fever a lien for their damages on the cattle which have communicated it. This lien was concurrent as to all of the parties who

sought to recover in this case. Neither one had a right to assert his lien to the exclusion of any other. It is impossible to perceive how the rights of the parties to satisfy their claims out of the proceeds of the cattle could have been properly determined, or how, in the language of section 36, above quoted, there could have been a complete determination or settlement of the questions involved without the presence as parties of all persons entitled to a lien. If only two persons had suffered loss, the determination of their respective rights in one action would not seem a very remarkable practice. It is only because of the very great number of parties interested in this case that the question is made to appear so serious. The principle applicable, however, is the same, whether there be two claimants or 200. The right of the plaintiff to join all against whom a recovery is sought does not seem to be seriously questioned, and does not admit of doubt. We think there was no error in the
261 rulings of the court upon these matters. The case of Harsh *vs.* Morgan, 1 Kan., 293, and Palmer *vs.* Waddell, 26 Kan., 352, and other cases cited by counsel, do not appear to us to have any application to the question before us.

Complaint is also made of the manner of preparing and receiving the verdicts. Under the circumstances of this case, and in the absence of any demand for separate trials, we are unable to perceive that there was any error in the course adopted by the court.

Among the verdicts returned by the jury there was one in favor of J. W. Ketcham for $391. After the jury had been discharged for the term, the attorney for Ketcham moved to correct the verdict in his favor by adding $417 thereto, which it is claimed was shown to be due him by a special finding of the jury, in addition to the amount allowed in the general verdict. On his application the foreman of the jury was brought into court and permitted to sign the special finding and an amended verdict for $808, and on this amended verdict judgment was rendered in his favor against the railway company. There is nothing in the record brought to this court showing that this special finding was returned with the other special findings. The signature of the man who had been foreman of the jury, after they were all discharged for the term, with or without leave of the court, could not make a verdict nor supply a substantial defect in one. If the special finding had been duly returned into court, it would control the general verdict. Whether it is absolutely indispensible that answers to special questions should be signed by the foreman we need not now determine, for we are of the opinion that the record fails to show that the special finding was returned by the jury at all. It follows, therefore, that the
262 judgment in favor of Ketcham must be modified to $391, the amount allowed by the general verdict of the jury. In all other respects the judgment is affirmed.

All the justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

263 And afterwards, on the 28th day of April, 1896, the same being one of the regular judicial days of the January term, A. D. 1896, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Hon. David Martin, chief justice, and Hon. W. A. Johnston and Hon. S. H. Allen, associate justices, and C. J. Brown, clerk of said court—the following proceedings, among others, were had and entered of record as follows, to wit:

THE M., K. & T. R'L'Y Co., Pl'ff in Error,
vs.
CHARLES HABER *et al.*, Def'ts in Error. } No. 10003.

On application of the plaintiff in error, it is hereby ordered that the time for the filing of a petition for a rehearing herein be extended to May 12th, 1896.

264 And afterward, on the 11th day of May, 1896, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for a rehearing of this cause, which is in words and figures as follows, to wit:

265 In the Supreme Court of the State of Kansas.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
CHARLES HABER and Others, Defendants in Error.

Petition for Rehearing.

Comes now the plaintiff in error and for its petition for rehearing in the above-entitled cause, respectfully represents and shows to the court:

1. That in the decision in this case and in the opinion handed down herein, this court overlooked numerous questions de-
266 cisive of the case and duly submitted by counsel for the plaintiff in error. That it has overlooked and misapplied numerous adjudged cases of respectable courts upon the questions involved in this case.

In so far as the plaintiff in error was connected with the cattle in question, it was purely a question of interstate commerce upon which Congress has acted by the passage of the act of May 29th, 1884, for the establishment of a Bureau of Animal Industry, etc., and various provisions in relation thereto. The title of said act was, "An act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals."

It will be observed that this is not for any particular State or for any particular Territory, but it is as broad as the United States, and

the object of the act is to ascertain in what particular localities pleuro-pneumonia and other contagious diseases exist and to provide a national system of quarantine for the purpose of preventing the spread of such diseases.

Section 1 of said act reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the Commissioner of Agriculture shall organize in his department a Bureau of Animal Industry, and shall appoint a chief thereof, who shall be a competent veterinary surgeon, and whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country; and the Commissioner of Agriculture is hereby authorized to employ a force sufficient for this purpose, not to exceed twenty persons at any one time. The salary of the chief of said bureau shall be three thousand dollars per annum; and the
267 Commissioner shall appoint a clerk for said bureau, with a salary of one thousand five hundred dollars per annum."

It will not be going out of the record to say, in view of the issues that were joined in this case, that the Secretary of the Department of Agriculture did organize under the above section a Bureau of Animal Industry. That he appointed a chief, and that such chief is a competent veterinary surgeon, and that such veterinary surgeon has performed his duty as prescribed by the above act of Congress, and that he has determined in what particular localities the disease of pleuro-pneumonia and other contagious diseases exist.

Section 2 of said act reads as follows:

"That the Commissioner of Agriculture is authorized to appoint two competent agents, who shall be practical stock-raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be under the instructions from the Commissioner of Agriculture, to examine and report upon the best methods of treating, transporting and caring for animals and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia and to provide against the spread of other dangerous, infectious and communicable diseases. The compensation of said agents shall be at the rate of ten dollars *per diem*, with all necessary expenses, while engaged in the actual performance of their duties under this act, when absent from their usual place of business or residence as such agent."

Again, I may repeat that in view of the issues joined in this case, it is fair to say that this section has been observed, these assistants have been appointed and a part of their duty under the language of the act is to examine and report on the best method of treating, transporting and caring for animals and the means to be adopted
for the suppression and extirpation of contagious pleuro-
268 pneumonia and to provide against the spread of other dangerous, contagious, infectious and communicable diseases.

Under this second section the power of the Government and the best efforts of these men have been given to the investigation of the question as to where the disease of pleuro-pneumonia and other communicable diseases exist, including Texas, splenic or Spanish fever. Being men of science, and the chief of the Bureau of Animal Industry, a man educated as a veterinary surgeon, who under the section first above quoted, has to make it his special duty and exclusive business to investigate contagious diseases among domestic animals in the United States and his two assistants, appointed under section 2 of the act, to be practical stock-raisers and experienced men in the cattle business, who, under the direction of the Commissioner of Agriculture are to examine and report upon the best methods of treating, transporting and caring for animals and the means to be adopted for the suppression and extirpation of pleuro-pneumonia and to provide against the spread of other contagious, infectious and communicable diseases. These men are to report and upon the results of the study made by the chief of the Bureau of Animal Industry, a practical veterinary surgeon and the result of the study and investigation made by the practical stock-raisers and business men upon their report is to be based the conclusion of the Secretary of the Department of Agriculture as to where such diseases exist in the United States, and when these facts have been determined, the Government then puts forth its most scientific efforts to prescribe certain restrictions for the prevention of the spread of such contagion. Upon their report as to the localities where these contagious diseases exist the Secretary of the Department of Agriculture, is, under section 3 of the act, to prepare such rules and regulations as he may deem necessary for the safety
269 and effectual suppression and extirpation of said diseases and to certify such rules and regulations to the executive officer of each State and Territory and invite the authorities to co-operate in the execution and enforcement of the same.

Now, this court in its opinion handed down, has overlooked this specific provision which invites the State authorities to co-operate with the Federal authorities in enforcing the rules and regulations which may be prescribed by the Secretary of the Department of Agriculture under the act of May 29th, 1884. On the contrary, this court held in effect that the State was invited to prescribe and enforce more stringent rules and regulations than those prescribed by the Secretary of the Department of Agriculture; to declare the disease existing in localties where the Secretary of the Department of Agriculture, after a most thorough and scientific investigation, decided that it did not exist; to ignore the rules for the transportation of cattle from one State or Territory into another State or Tertory, which are prescribed by the Secretary under said act, and to enforce more stringent rules than he deemed necessary. Such is not the law of this State.

This court cannot say and does not say in its opinion handed down in this case, that the duties required of the Commissioner of Agriculture and the Secretary of the Department of Agriculture have not been fully performed in a careful and prudent manner, or

that they have not in a most exhaustive manner complied with the requirements of each section of the act of May 29th, 1884, above quoted.

Now, then, having determined that the disease exists, and where it exists, then section 6 of the act, which is quoted in the opinion of this court, provides that no railroad company shall transport any live stock from one State or Territory into another know-
270 ing them to be affected with any contagious, infectious or communicable disease and especially the disease known as pleuro-pneumonia. The prohibition of the Government simply extends to cattle which are known by transportation companies to be affected. Observe the language: "knowing them to be affected." It does prohibit the company from taking cattle from inside the quarantine line, except for immediate slaughter; but if the cattle are from outside or north and west of such line and the transportation company does not know them to be so affected, it is not a privilege but a public duty which it cannot evade, to receive such stock, and it cannot refuse to do so because possibly there may be a liability of communicating such disease, made possible by some mistake or accident over which the carrier has no control. The decision of this court contravenes the very language of the statute of May 29th, 1884, with reference to the transportation of cattle; ignores and repudiates the rule laid down by Congress requiring absolute knowledge before liability attaches, and imposes thereon a greater duty than that imposed by Congress, and simply makes the carrier liable regardless of the fact that in this case it insisted upon a strict observance by the owner of all the quarantine rules and laws both State and Federal.

Having determined that the disease exists and the localities where it exists, and for the purpose of preventing the transportation of cattle from that locality into localities where they may communicate the disease, it is made the duty of the Commissioner of Agriculture by section 7 of the act to notify in writing, the proper officials or agents of any railroad, steamboat or other transportation company doing business in or through any infected locality, and by publication in such newspaper as he may select, of the existence of such contagion. Then any carrier who shall knowingly violate the provisions of section 6 of the act shall be guilty of a misdemeanor.

271 Now, in accordance with said provisions, the Secretary of the Department of Agriculture on February 26th, 1892, issued his circular, which is found on page 36 of the record, and set out as Exhibit E to the answer of the defendant company, the execution of which was never denied but was expressly admitted on the trial of the case in the court below, and in which section the Secretary designates the section or area of country across the United States where the diseases of Texas, Spanish, splenic or southern fever exist. Under the terms and provisions of section 7 of the act of May 29th, 1884, he makes an order that from the 1st day of March until the 1st day of December, 1892, no cattle are to be transported from said area to any portion of the United States north and

west of the line designated as the infected area, except by rail for immediate slaughter, and then prescribes the rules and regulations to be observed in transporting such cattle by rail for immediate slaughter. His field of operations is the entire United States, and he shall determine in what particular localities the disease exists, and he prohibits the transportation of cattle from the localities where the disease exists into localities where it does not exist, and this is for the purpose of preventing the spread of such disease. The State authorities of each State are to be served with a copy of these rules and regulations and they are asked to co-operate in enforcing them, and are not asked to ignore them, nor are they invited to enlarge upon them or extend them to embrace other territory where the disease does not exist. If they co-operate in enforcing them it has been said with reference to quarantine regulations with reference to the public health that the State cannot go further than the General Government, and the General Government can enforce more strict quarantine regulations than can the State.

It is not claimed that the Secretary of the Department of Agriculture had served his notice of the existence of the disease
272 upon the railroad company, and that the railroad company had willfully ignored such notice and transported cattle into the State of Kansas which were forbidden under the rules and regulations of the Secretary of the Department of Agriculture. All of the evidence in the case shows that the shipment of cattle originated north and west of the Government quarantine line. That no notice whatever was ever served upon the company by the Secretary of the Department of Agriculture or by any inspector in his service or by any officer of the State, that any of these cattle were ever inside of the infected area, nor is there any evidence showing that in fact the cattle were ever inside of the territory designated by the Secretary of the Department of Agriculture as the infected area.

There is nothing in section 3 of the act of Congress which "expressly recognizes the rights of the States to pass laws and prescribe rules and regulations" affecting interstate commerce or interstate transportation. All that the States are invited to do by the terms and provisions of said section 3 is to assist the Secretary of the Department of Agriculture and those acting under him in enforcing the rules and regulations which he prescribed for the protection of the domestic animals of any particular State.

The fact that the cattle were transported a portion of the way through the infected area does not of itself make them dangerous cattle, nor is the transportation company forbidden to bring cattle through the infected area by the terms of the act of Congress. On the contrary, the rules and regulations of the Department of Agriculture provide disinfected pens, inside of the infected area, into which said cattle, that is, cattle from outside of the infected area, may safely be unloaded, fed and watered inside of the in-
273 fected area, in the pens specially provided for that purpose. So that the fact that the cattle came through the infected area and were unloaded, watered and fed in the pens specially provided at Fort Worth, which is inside of the infected area, would

not constitute the cattle dangerous, nor would it make the company liable if the cattle were in fact dangerous cattle, if the only opportunity to be inoculated with the disease, so far as the company knew, was the unloading, feeding and watering of the cattle in the pens at Fort Worth.

There must be knowledge on the part of the company that the cattle themselves at the time the shipment originated were capable of communicating the disease to native cattle. In the case at bar, so far as the evidence discloses, such knowledge on the part of the company was entirely lacking. It is disclosed in the testimony that an animal incapable of communicating the disease may become inoculated and sick of the disease by coming in contact with cattle from the infected area; but such animal will not communicate the disease to another native animal. The disease can only be communicated by cattle from inside of the infected area. So the pens provided for by the regulations of the Secretary of the Department of Agriculture, where cattle from outside of the infected area and being transported through the same, may be unloaded, fed and watered, are provided for the purpose of the protection of the cattle and preventing them from becoming inoculated with the disease while inside of the infected area, and not for the purpose of preventing such cattle from communicating the disease to other native cattle.

By the terms of section 3 the Commissioner of Agriculture may accept the plans and methods adopted by any State for the suppression and extirpation of pleuro-pneumonia and other contagious diseases. But in this case there is nothing to show that the
274 Secretary of the Department of Agriculture ever accepted the laws passed by the legislature of the State of Kansas in any manner, or adopted them. On the contrary, the very circular issued by the Secretary of the Department of Agriculture on February 26th, 1892, and the rules and regulations by him promulgated contravene the act of the legislature of the State of Kansas of 1891, and do not contain one word tending to show, nor is there anything in the evidence in this case that discloses the slightest intention on the part of the Secretary of the Department of Agriculture to accept the provisions of the act of the Kansas legislature of 1891. It is entirely ignored in his circular and is not referred to by him anywhere.

In view of the special effort made by Congress to determine where the disease known as Texas fever exists and what cattle are liable to communicate such disease, and in view of the fact that the Secretary of the Department of Agriculture has prohibited the shipment of cattle from what is termed the infected area, is it for the Kansas legislature, or for this court, or for the State board of live-stock sanitary commissioners of this State to say that it exists elsewhere? We submit that it is not. Take this very shipment in this case. Cattle have been shipped from this very ranche for three years by Hosier Brothers, and for a number of years prior to their ownership of the ranche, always at about the same time of the year, and never before did the cattle communicate Texas, splenic or

Spanish fever. As to why the cattle did at this time is something that cannot be explained; but they certainly were not dangerous cattle or they would have communicated the disease before. But notwithstanding the history of the cattle, notwithstanding the fact that they were considered safe, notwithstanding the fact that under the act of May 29th, 1884 and the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder, and the further fact that the railroad company
275 was bound to take the cattle and could not refuse them, and still further, the extra precaution taken by the carrier in this instance to insist upon the special investigation by the board of live-stock sanitary commissioners of this State, we would like for this court to point out wherein the carrier was guilty of any negligence in receiving the cattle. If its negligence cannot be pointed out then we submit that its liability cannot be made clear upon any substantial or tangible basis. If there was a violation of law by the carrier in accepting the cattle on this particular occasion, there was a violation by the carrier every year previous when these cattle were brought into the State. If there was no violation of law prior to this occasion, then there was no violation on this occasion unless the carrier knew that the cattle were dangerous cattle and were liable to communicate the disease known as Texas, splenic or Spanish fever. But is the carrier to be presumed to know more than the owner of the cattle, or to know more than the Secretary of the Department of Agriculture, who relies upon the scientific and exhaustive investigation of the chief of the Bureau of Animal Industry whose duty it is to make a special study of this disease and to ascertain in what localities it exists? What reason was there for supposing for a minute that these cattle were capable of communicating the disease known as Texas, splenic or Spanish fever in the light of the previous history of the same cattle for a number of years, and in the light of the investigation which had been made by the chief of the Bureau of Animal Industry?

2. That in the decision of this cause and in the opinion handed down herein, this court overlooked the question decisive of the case duly submitted by counsel for the railway company, that in so far as the railroad's connection with the cattle in question is concerned it was, pure and simple, a question of interstate commerce
276 upon which Congress has acted by the establishment of its Bureau of Animal Industry, and by the various provisions of the act of Congress of May 29th, 1884, in relation thereto, including the specific provisions by which it confided the execution of the details of a general system of quarantine and sanitary regulations to the Secretary of the Department of Agriculture, whereby the Kansas-Texas cattle law was abrogated so far as it undertakes to regulate interstate shipments of cattle.

This court in its opinion uses the following language: "The Secretary (meaning the Secretary of the Department of Agriculture of the United States Government) had no power under the act of Congress (meaning the act of Congress approved May 29th, 1884, entitled: 'An act for the establishment of a Bureau of Animal In-

dustry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases of domestic animals'), to make any regulations which would have an effect to abrogate in any degree the statutes of this State."

The entire opinion is in harmony with the language above quoted, and the gist of the opinion is therein contained.

But it is respectfully submitted on behalf of the plaintiff in error that the question of transportation from one State into another and the regulation of the same is always a matter exclusively for Congress.

See Hall *vs.* De Cuir, 95 U. S., 485, wherein Chief Justice Waite said:

" We think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to
277 interfere directly with its freedom, does encroach upon the exclusive power of Congress. * * * If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay, more, it could prescribe rules by which a carrier must be governed within the State in respect to passengers and property brought from without. On one side of a river or its tributaries it might be required to observe one set of rules, and on t. e other, another Commerce cannot flourish in the midst of such embarrassment."

Also, Bowman *vs.* C. & N. W. R. R. Co., 125 U. S. 507, and we quote from the opinion therein as follows:

" But where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the transportation of goods from one State to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the State shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

Also, from the previous decision of this court in the case of
278 Hardy *vs.* A., T. & S. F. R'y Co., 32 Kansas, 698, wherein this question is discussed fully and exhaustively and the conclusion reached by the court is stated as follows:

" From these authorities and the cases therein cited, we think it is conclusively settled that the portion of either interstate or foreign commerce which consists in transit or traffic, including transportation in all forms, by land or by water, and the purchase, sale or ex-

change of goods, is national, and susceptible of a uniform plan of regulation, and it is therefore under the exclusive control of Congress. Even if Congress had not seen fit to prescribe any specific rules to govern interstate commerce, that does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

This being a Federal question this court is bound by the decisions of the Supreme Court of the United States with reference thereto. When the Supreme Court of the United States says that all questions of transportation from one State to another are national in their character and admit and require uniformity of regulation effecting alike all the States, it is incompetent for this court, which is merely an inferior court so far as this question is concerned, to say that it is not within the power of Congress or of the Secretary of the Department of Agriculture to abrogate the Kansas law upon this question. Not only that, but this court is bound by its previous decision, unless some real good reason is apparent for overruling the same. The previous decision of this court in the case of Hardy *vs.* Santa Fe R'y Co., *supra*, is not referred to in the opinion of this court, but a doctrine clearly at variance therewith is announced in the opinion handed down in this case. While the opinion of this court in the case of Hardy *vs.* Santa Fe R'y Company, *supra*, and from which we have just quoted, states that that portion of our interstate or foreign commerce which consists
279 in transit traffic, including transportation in all forms, by land or by water, is national and susceptible of a uniform plan of regulation and is therefore under the exclusive control of Congress and the failure of Congress to act is equivalent to a declaration that interstate commerce shall be free and untrammeled. Now, apply that doctrine to this case. We find that the Secretary of the Department of Agriculture, through his expert veterinary, who is chief of the Bureau of Animal Industry, has determined the localities in which Texas fever exists, and the Secretary has issued his rules prohibiting the transportation of domestic animals from those localities into the localities where it does not exist, that is equivalent to saying that transportation, traffic, interstate commerce shall be free and untrammeled in every portion of the United States, except that portion around which he has drawn an imaginary line called the quarantine line, and from inside of which he has prohibited the transportation of domestic animals except for immediate slaughter. The opinion of this court is in contravention of the paramount authority of the Federal Government over a matter especially delegated to it by the Constitution, to wit: the regulation of commerce between the States. It is in opposition to the views of the United States Supreme Court in the case of Morgan *vs.* Louisiana, 118 U. S., 455, wherein the court says in the following language:

"It may be conceded that wherever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of

such a system to a national board of health or to local boards, as may be found expedient, all State laws on the subject will be abrogated, at least so far as they are inconsistent."

Congress undertook, by virtue of the act of May 29th, 1884,
280 to provide a general system of quarantine and regulations for the purpose of the suppression and extirpation of contagious diseases among domestic animals and it confided the details of its system of quarantine to the Secretary of the Department of Agriculture. In the light of the above decision all State laws on the subject are abrogated in so far as they are inconsistent. If the Secretary says that the transportation of domestic animals from points north and west of his quarantine line shall be free and untrammeled, what authority has this court or this State to impose a burden upon the carrier for the performance of an act which it is bound by the general law affecting carriers and also under the rules and regulations of the Department of Agriculture to perform? To put it in different language, where is the authority in this State to impose a burden upon the carrier for performing an act of interstate commerce when Congress says with reference thereto, no burden or penalty shall be imposed and that transportation shall be free and untrammeled?

Congress through the Secretary of the Department of Agriculture says that the transportation of cattle from north and west of its quarantine line shall be free and untrammeled. This court says that the legislature of this State can extend that line and include territory therein and impose restrictions upon the transportation of animals, not imposed by the act of Congress or the rules and regulations promulgated by the Department of Agriculture. Is this leaving the transportation of domestic animals from points north and west of the Government quarantine line free and untrammeled? Is the declaration of Congress made through the Secretary of the Department of Agriculture, that said traffic shall be free and untrammeled, to be lightly ignored, abrogated and trampled under foot by the legislature of this State and by the supreme court of this State?

281 In the case of Bowman *vs.* C. & N. W. R'y Co., from which we have quoted herein, we see that the police power of the State exercised by its proper officers will not operate upon the cattle transported in this case until after the transportation has been completed and the cattle have been unloaded from the cars and mingled with the property of the State. Yet the decision of this court is in contravention of that decision.

To say that a carrier shall be liable for the spread of the disease among domestic animals when it has no notice of the dangerous character of said animals carried by it, is announcing a new doctrine in the law of carriers.

It has heretofore been generally understood and supposed to be the law with reference to the liability of carriers that such carrier was not liable unless it had knowledge of the dangerous character of the article or commodity transported. Supposing an M., K. & T. passenger train should arrive at the south line of the State and

have on board a passenger affected with the smallpox. None of the trainmen are acquainted with the disease, and yet it spreads and lives are lost; is the company liable? On the other hand, suppose it had brought a train-load of cattle from Illinois into the State of Kansas, and disease should break out and spread from the cattle so transported; would the railroad company be liable? Most certainly not, having had no knowledge of the dangerous character of the cattle. Yet, there is no more restriction under the act of May 29th, 1884, or the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder, against shipping cattle from Pecos county, Texas, than there was against shipping cattle from Illinois, Iowa or any other State in the Union.

This court says that the legislature of Kansas has imposed
282 additional restrictions and that such cattle cannot be brought into the State. If this is true, it is an absolute prohibition and the law is unconstitutional. If a corporation is to be held to an absolute liability under the Kansas law because the cattle happen to be from south of the south line of the State of Kansas, then we wish to say that the law is unconstitutional and must give away to the act of Congress of May 29th, 1884, and the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder, because to hold that the effect of the Kansas statute is to impose an absolute liability upon the importation of cattle from south of the south line of the State of Kansas, or from south of the 24th parallel of latitude, is, in effect, to impose a burden upon interstate commerce, where the act of May 29th, 1884, and the rules and regulations prescribed thereunder, says it shall be free and untrammeled.

The court says in the opinion: "The conclusions we have reached render it unnecessary to consider how far Congress by acts passed for the regulation of interstate commerce could go in curtailing the power of the legislature of this State to protect its citizens from the introduction of infectious and contagious diseases dangerous to their life or destructive to their property."

In the above conclusion this court overlooked the fact that the question is not "how far Congress by acts passed for the regulation of interstate commerce could go in curtailing the power of the legislature of this State to protect its citizens from the introduction of infectious and contagious diseases dangerous to their life or destructive to their property," but how far can the State go in restricting interstate commerce or imposing a burden thereon where Congress says it shall be free and untrammeled.

It is admitted at the outstart that the power of Congress
283 over the question of interstate commerce, and as transportation from one State to another is interstate commerce, the power of Congress over transportation is unlimited. Just so long as Congress does not attempt to interfere with the regulation of the domestic affairs of the State its power cannot be questioned. The decision of this court in upholding the State statute and striking down the Federal law, and denying the authority of the General Government, through its Department of Agriculture to make any

regulations which would have the effect to abrogate in any degree the statutes of this State, carries the doctrine of State's rights to a degree hitherto unknown to the jurisprudence of this country. It would seem from the amount of blood and treasure spent some thirty years ago in the settlement of this question that it ought not again to be heard or to receive sanction and support, at least in the State of Kansas.

Again, this court overlooked the important and controlling fact that Congress by the passage of the act of May 29th, 1884, and the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder curtailed interstate commerce as far as the investigation by the Secretary of the Department of Agriculture made through his chief of the Bureau of Animal Industry, thought it necessary to do so for the safety of domestic animals of the State of Kansas and elsewhere north and west of the quarantine line, and that its action with reference to this question and every phase of it has been most thorough and complete, leaving absolutely nothing for the States to do but to co-operate in the enforcement of the provisions of said act and the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder.

3. This court in the opinion handed down in this case overlooked the fact which is controlling in the case that there is no statute in the State of Kansas upon this subject that by direct terms
284 can be made by any kind of construction to interfere in any manner with the business of a carrier of interstate commerce. Not only did this court overlook this question in the opinion handed down, but it overlooked the further question that the statutes of Kansas affecting this subject directly recognize the rights of a carrier of interstate commerce. The section of the statute under which it is claimed in the opinion handed down that the corporation can be made liable is section 3 of chapter 201 of the Laws of 1891, which reads as follows:

"That section 6774 of the General Statutes of 1889 be and the same is hereby amended so that the same shall read as follows: Sec. 6774. Any person or persons who shall drive, ship or transport or cause to be shipped, driven or transported, into or through any county in this State, any cattle liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of this State, shall be liable to any person or persons injured thereby for all damages that they may sustain by reason of the communication of said disease, or Texas, splenic or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction, and the parties so injured shall have a first and prior lien to all other liens for such damages on the cattle communicating the disease of Texas, splenic or Spanish fever."

This statute does not in terms attempt in any manner to interfere with the business of a common carrier of interstate commerce. It does not in terms attempt in any manner to make the railroad company liable in any way for the bringing or shipping in of cattle capable of communicating Texas fever. That it refers entirely to

the owners of the cattle, or the agents of the owner who may have the cattle in charge, is plainly indicated by the words, "who shall drive, ship or transport, or cause to be driven, shipped or transported." Now, the transportation company does not drive, does not ship, but of course it may transport for the owner, then the owner causes them to be transported. The owner may transport his own cattle or he may cause them to be transported over the line of the railroad company. It also provides that the parties
285 injured shall have a first and prior lien to all other liens for their damages, evidently intending to make the owner of the cattle liable, and in case of his non-residence or insolvency to make the cattle themselves liable to the extent of their value in satisfying claims for damages. In no other place in the statute is the word transport used; in no other place in the law of 1891 can there be by any kind of construction any reference whatever to the carrier, but this section cannot be made to impose a liability on the part of the carrier without doing violence to all the recognized rules for the construction of statutes. But the law of 1891 is to be construed with other provisions of the statute. This Texas cattle law is as old as the State itself, and we have some provisions of the statute which date back as far as 1873, but they do not pertain to this question. We have some provisions which date back to 1881, but there is no pretense or claim that they have any reference to this question. But as early as 1873, the legislature of the State of Kansas, recognizing the right of a carrier to bring cattle from south of the south line of the State of Kansas, and its inability to prohibit such importation, provided in section 1 of chapter 139 of the Laws of 1873 for a quarantine ground, where these cattle could be stopped, unloaded, inspected and kept until all danger of communicating contagious disease was passed and then reshipped to the point of destination within the State. That provision is still on the statute book and is in full force and effect today, and it was exempt from all provisions prohibiting the importation of Texas cattle or cattle capable of communicating this disease. The enactment of this provision is a direct recognition of the rights of an interstate carrier to bring the cattle into the State of Kansas. Now, if the proper authorities of the State deemed such cattle dangerous they would be unloaded on the quarantine ground and detained until the danger had passed and the fact that these cattle were not placed on the quarantine ground, as provided for by the legislature,
286 in this case indicates that the quarantine officers of the State considered them safe cattle. As to whether or not they are safe cattle, by the laws of this State it is made the duty of the State board of live-stock sanitary commissioners, and the State veterinary, who is appointed by the governor, to investigate and determine, and it is nowhere made the duty of the railroad company or any of its employés to investigate this question and determine for the State, and be responsible in case it should fail to do so. In this connection we desire to call the court's attention to article 11 of chapter 105, General Statutes 1889, which relates exclusively to the State veterinary and his duties. Section 6798 provides that the

governor shall appoint a competent and skilled veterinary surgeon for the State, who at the date of such appointment shall be a graduate in good standing of some recognized college of veterinary surgery, and who shall hold his office until his successor is appointed and qualified. The next section provides for the duty of the State veterinary and his qualifications—that he shall take an oath and give a bond for the faithful discharge of his duties, etc. The next section reads as follows:

"It shall be the duty of the State veterinarian, under the direction of the live-stock sanitary commission for the State, to investigate any and all cases of contagious or infectious diseases among domestic animals of the State, which may come to his knowledge or be brought to the notice of the live-stock sanitary commission, and for this purpose shall visit at once any locality within the State where any such contagious or infectious disease of domestic animals shall be reported to exist, and make a full and careful examination of all animals supposed to be diseased, and inquire into the nature and cause of any such disease which he may discover; prescribe the proper care, necessary remedies, and direct the sanitary measures necessary to prevent the spread thereof; and to make a full report of his findings and doings in the premises, to the live-stock sanitary commission, with recommendations and suggestions as to the means necessary to be employed to prevent the spread, and best calculated to exterminate any and all such contagious or infectious diseases, by him found to exist among the domestic animals of the State."

287 This section evidently relates to such diseases of domestic animals as shall be discovered to exist among domestic animals within the limits of the State. The next succeeding section provides as follows:

"The State veterinary shall make a continuous and scientific study and investigation of all diseases of domestic animals, and the causes, preventives and cures thereof, and report the result of his study and investigation to the secretary of the State board of agriculture, giving in plain and ordinary language the symptoms by which any disease may be identified; how liable to be introduced and spread; the causes and conditions to which may be attributed the production of any such disease, and the sanitary and other measures best calculated to prevent the germination and spread of any such contagious or infectious disease among live stock, together with the best known treatment and remedies, also the treatment necessary in case of injury to domestic animals, in time for publication in the several reports required by law of the State board of agriculture; and perform such other service and duties as may be required by law or directed by the live-stock sanitary commission in the interest of the State."

It is evident that this section contemplates that the veterinary shall not confine his studies to such diseases as he may find within the State, but that he can extend his researches, his investigation and his studies to diseases of any and all domestic animals wherever such disease may appear. Not only does he study the disease from

a scientific standpoint but he investigates as to the causes and the preventatives and cures thereof, and he shall report the result of his study and investigation to the Secretary of the Department of Agriculture, giving in plain and ordinary language the symptoms, etc., and how liable to be introduced and spread. When the State veterinary has complied with this section of the statute then the executive department is fully informed as to the section from which the disease may come into the State and is fully informed as to the nature of the disease, and exactly what steps are necessary to prevent its importation or to control the disease after it has been imported into the State and the manner of dealing with it
288 and all questions relating to this matter are then left to the live-stock sanitary commission, composed of three men, who, like the State veterinary, are required to take an oath for the faithful discharge of their duties, and are also required to give a bond. It is also made the duty of this board to make study of the diseases of domestic animals and to protect the animals of the State from all diseases of an infectious or contagious character, and for such purpose are empowered to establish, maintain and enforce such quarantine, sanitary and other regulations as may be deemed necessary.

Now, we pass to section 6819 passed at the same session of the legislature, which gives the governor power to issue a proclamation and quarantine against any dangerous contagious or infectious disease which has become epizootic in certain localities in other States, which reads as follows:

"Whenever the governor of the State shall have good reason to believe that any dangerous, contagious or infectious disease has become epizootic in certain localities in other States, Territories, or countries or that there are conditions which render such domestic animals from such infected districts liable to convey such disease, he shall, by proclamation, prohibit the importation of any live stock of the kind diseased into the State, unless accompanied by a certificate of health, given by a duly authorized veterinary inspector and all such animals arriving in this State shall be examined without delay by the State veterinary surgeon and if deemed necessary, placed in close quarantine until all danger of infection is passed, when they shall be released by order of the veterinary surgeon or the live-stock commission."

The governor may get this information from his veterinary surgeon, and this section provides as you will see by its terms that even though the cattle come from sections of the country in other States which the governor understands to be affected with a contagious or infectious disease, yet he has no power to prohibit
289 the importation of these animals, if they are covered by a certificate of health given by a duly authorized veterinary inspector.

In this case we had proper certificates of health given by a duly authorized inspector. As to whether or not he was a veterinary the record does not disclose. It does appear that he was empowered by the live-stock sanitary commission to issue certificates of the

health of cattle being transported into the State and that he acted for them under such authority in the giving of this very certificate, so that under this very section of the statute, even though the animals had been prohibited by the proclamation of the governor from entering the State as dangerous cattle, the proclamation would only affect them if they attempted to enter the State without the proper certificate, and if they had the proper certificate they could then enter the State regardless of the fact that they had come from territory, which according to the governor's proclamation was designated as an infected area.

These cattle were accompanied by the very certificate provided for by this section of the law. Suppose they had not been? This section provides when not accompanied by this certificate of health that all such animals arriving in this State shall be examined without delay by the State veterinary surgeon and if deemed necessary, placed in close quarantine until the danger of infection has passed, when they shall be released by the order of the veterinary surgeon or the live-stock sanitary commission. There is no evidence in this case that the cattle imported were not examined by the veterinary surgeon of the State. It was one of his duties to examine them. The railroad company has no control over them. It is not pretended anywhere in the record that it interfered with the proper discharge of his duties or that it interfered in any manner
290 with the proper discharge of the duties of the live-stock sanitary commission. The facts are, that one A. M. Hunter, acting for the live-stock sanitary commission was stationed at Parsons, Kansas, to investigate Southern cattle being transported over the road and that he examined these cattle and says they were all right. Their papers were all right. See page 75 of Record.

It is true the section above quoted does not give the State veterinary any special authority to delegate a veterinary surgeon to act for him; but we find a man was acting for him. There is not a word of testimony in the record as to whether he was a veterinary or not, but whether he was or not, he was acting for the State veterinary and live-stock sanitary commission and he did inspect these cattle and pass upon them and decided "their papers were all right." In case Hunter thought the cattle dangerous it was his duty under this section of the statute to stop the cattle and hold them until all danger of infection had passed. In case the railroad company had refused to permit the inspection of them he should have called upon the authorities or the good citizens of the State of Kansas as he desired to help him enforce the law.

The live-stock sanitary commission are given power under section 6825 to create and enforce quarantine against the disease known as Texas fever in the unorganized counties of the State; but as we have attempted to show in the briefs filed in this case, there is no pretense that the railroad company violated any express provision of the statute imposing any duty whatever upon it. On the contrary, all of the provisions of the statute taken together recognize the right of the railroad company to bring these cattle into the State of Kansas, and it is made the duty and special business of the

State veterinary and live-stock sanitary commission to investigate as to the character of the cattle and to the necessary steps to
291 protect the domestic animals of the State from any infectious disease. The law of 1891, when construed in the light of other provisions of the statute passed prior to that time, does not pretend, in terms, or by inference, to impose any burden whatever upon the carrier for bringing cattle into the State from the South or the south line of Kansas, or from south of the 34th parallel of north latitude. On the contrary, the entire statute, including the law of 1891, recognizes the absolute right of the carrier to bring this class of cattle into the State, and provides that the entire power of the State may be brought to bear to properly regulate and handle the cattle after they have arrived at the south line of the State, in such way and manner as to protect the domestic animals of the State from infectious or contagious diseases.

This is the only proper and legitimate construction that can be put upon the statute affecting this matter. It cannot be contended for one minute that the word, "transport," was ever intended to specially apply to common carriers in such manner as to change their liability as such. These cattle could have been driven into the State from south of the south line of Kansas, by the owner. Consequently, the fact that the carrier, the plaintiff in error in this case, owned a line of railroad and permitted the owner of the cattle to ship them over its line of railroad, did not in any way contribute to the spread of the disease. Is it to be made liable solely upon the ground that it owns a line of railroad and is engaged in the business of a common carrier—was that the only way these cattle could have been gotten into the State? Suppose the M., K. & T. R'y stopped three miles south of the south line of Kansas and the cattle had been there unloaded and the cattle driven into the State by the owner, would the company still be liable because it had carried the cattle for the owner within three miles of the State line and thereby facilitated the passage of the cattle into the State? If
292 the plaintiff in error is liable at all it must be made liable under some general principle of the common law, for there certainly is no statute which in terms attempts in any way to make it liable. The law of 1891 refers entirely to the owner of the cattle, and to such persons as may have the cattle in charge. The testimony in this case discloses that the railroad company never did have the cattle in charge. It could not load them or unload them. It had no control over them. If a steer was down in a car it was not the duty of railroad employés to get it up. They had no control over the cattle. The cattle were never in charge of the railroad company. It did not feed or water them. All it did was to pull the cars in which the cattle were loaded over its track and facilitate the passage of the cattle.

If the statutes of the State are to be construed as making the carrier liable for bringing cattle into the State from south of the south line of Kansas or from south of the 34th parallel of north latitude, having no other knowledge of the character of the cattle except that they are from north and west of the Government quarantine

line, then we say that the law of Kansas is absolutely prohibitory and comes squarely within the case of H. & St. J. R. R. *vs.* Husen, 95 U. S., 465.

To say that a carrier shall be liable for all damages which may occur by reason of the shipping in of any cattle from south of the south line of Kansas or from south of the 34th parallel of north latitude, is equivalent to say-, " You shall not bring them in." Is equivalent to saying, " We will add a burden or tax upon you if you do bring them in." If the statute was absolutely prohibitory and said to the transportation company, " You shall not bring in the cattle," I apprehend that nothing more could be done than to impose a fine against the corporation for bringing the cattle
293 in, and impose the additional burden of making the corporation liable for all damages which were occasioned by the bringing in of the cattle. The law would be unconstitutional whether the fine was imposed or not if its terms are prohibitory and to simply attach the burden without adding the prohibitory words renders the law just as obnoxious as an interference with interstate commerce, as though the prohibitory words were added. So, if the statutes of this State are to receive the construction given them by the court in the opinion handed down in this case, there can be no question but what the law is absolutely unconstitutional as an unwarranted interference with interstate commerce. Now I desire to quote a portion of the opinion in the case of Railroad Company *vs.* Husen, *supra:*

" The Missouri statute is a plain interference with such transportation; an attempted exercise over it of the highest possible power—that of destruction. It meets at the borders of the State a large and common subject of commerce, and prohibits its crossing the State line during two-thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the State without being unloaded. But even the right of steamboat-owners and railroad companies, to transport such property through the State, is loaded by the law with onerous liabilities, because of their agency in the transportation. The object and effect of the statutes are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States. This court has heretofore said that interstate transportation of passengers is beyond the reach of a State legislature."

The effect of the construction given by this court to the Kansas law is to add the " onerous liabilities " referred to in the above opinion because of the agency of the corporation in the transportation of the cattle.

294 The case of Railroad Company *vs.* Husen, *supra*, has been followed in the case of Gilmore *vs.* H. & St. Jo. R. R. Co., 67 Mo., 323, Adams Express Company *vs.* Board of Police, 65 Howard's Practice, 72, C. & A. R. R. Co. *vs.* Ericson, 91 Ills., 613, and by this court in the case of Hardy *vs.* A., T. & S. F. R. R. Co. *vs.* Railroad Co., *supra.*

The Illinois statute which was just like the Kansas statute, ex-

cept that it had the prohibitory words, was held to be unconstitutional in the case of C. & A. R. R. Co. *vs.* Ericson, *supra*, and the Missouri statute referred to in the above decision of R. R. Co. *vs.* Husen, was held in case of Gilmore *vs.* Hannibal & St. Jo. R. R. Co., *supra*, to be unconstitutional. But the decision above
295 quoted in the case of Railroad Company *vs.* Husen, is to the effect that the right of the steamboat-owners and railroad companies to transport such property into and through the State cannot be loaded with "onerous liabilities" because of the agency of the carrier in the transportation.

In the case of Mo. Pac. R'y Co. *vs.* Finley, 38 Kan., 550, this court decided that the railroad company is not liable for transporting cattle into the State where it acts in good faith and without knowledge, or upon such facts as charge it with knowledge, that the cattle are of a kind liable to communicate contagious diseases to domestic animals of the State. Now the only facts coming to the knowledge of the railroad company in this case, as we will show further on in this petition, were, that the cattle were from south of the south line of Kansas and south of the 34th parallel of no-th latitude. Yet we see, and it is apparrent by the above authorities, that it is just as competent for the legislature of Kansas to say that there shall be no Texas or Mexican cattle brought into the State during a certain season of the year, as to say there shall not be any brought from south of the south line of the State or from south of a certain line. It is perfectly proper for the State to provide proper inspection laws to determine just what cattle are dangerous and what are not. They can be inspected before they arrive at the south line of the State, or if they come from a country supposed to be infected with a contagious disease, they can be stopped at the State line and inspected and detained until all danger is passed; but the legislature has not the power to say to the corporation engaged in interstate commerce, "You may bring these cattle in at your peril," because to say that is to impose duties upon the carrier which amount to a burden or tax upon it, and such laws are always unconstitutional.

296 This court in the opinion handed down clearly misconceived the law applicable to the facts in this case when it stated that the "responsibility of the carrier could not be lightly shifted to the shoulders of the owners or other persons taking part in the shipment."

The carrier being simply the agent in the employment and under the direction of the owner would not be responsible unless it had knowingly carried the germs of the disease into the State in violation of some law of Congress or of some rule promulgated by the Secretary of the Department of Agriculture thereunder. It is not pretended that the evidence in this case shows that the railroad company knew anything with reference to the dangerous character of the cattle. All that has been claimed is that the railroad company ought to have known that bringing cattle from south of the south line of Kansas or from south of the 34th parallel of north latitude was sufficient to put it upon its most careful inquiry as to the character of the cattle; but at the same time it is admitted that

the cattle are from west of the Government quarantine line. Every inspector who examined the cattle, and they were inspected at Fort Worth by Howard Rhoads and at Parsons by A. M. Hunter, pronounced the cattle all right. Now then, what fact was there to indicate to the M., K. & T. R'y Co., or to any of its agents or servants, that the cattle were of a dangerous character? We submit that the entire record does not disclose a particle of testimony brought to the knowledge of the railroad company or the least intimation that the cattle were not all right, while in the opinion handed down in this case it is assumed that the railroad company knew of the dangerous character of the cattle. The assumption is wrong; it was a fact to be proven by the plaintiff in the case and we submit that such proof is wholly lacking and the plaintiff's case failed for want of it.

297 In the opinion handed this court calls attention to the fact that Pecos county is on the quarantine line; that the quarantine line runs on the eastern boundary thereof. That is true, and there is evidence to show that some of the cattle belonging west of the range and some of the cattle of Hosier Brothers had wandered over the line, but the testimony of both Dr. Richards and Dr. White, both veterinary surgeons, both of whom had made a study of this disease, both of whom were familiar with the location of the Government quarantine line, both testified that the quarantine line was put over in safe territory sufficiently far to guard against cattle straying across the line into territory that was deemed infectious or dangerous. But conceding that the evidence does disclose that some of the cattle of Hosier Brothers did wander across the line into the territory that was infected with Texas fever, where is the evidence that such fact was known to the railroad company at the time it accepted the cattle for shipment. It was not in the testimony and yet it was a fact that must be proven by the plaintiff upon whom rested the burden of proof in this case. The evidence of the Brogans, the evidence of Hosier Brothers and the evidence of the employés of the railroad company was all to the effect that the cattle were from Pecos county, Texas, and the evidence of the inspectors who examined the cattle as they passed along the line of the railroad was that the cattle were apparently all right, were a good lot of cattle and were all right. There is not one word of testimony showing that there was any knowledge brought home to the railroad company to the effect that the cattle were of a dangerous character.

To say that because the statutes of Kansas make the bringing in of cattle from south of the south line of the State or from south of the 34th parallel of north latitude and that that of itself was

298 sufficient, would be to make the statutes of Kansas absolutely prohibitory, and hence bring them squarely within the decision of the Supreme Court of the United States in the case of Railroad Company *vs.* Husen, *supra*, where the law of Missouri was held to be unconstitutional, not because the two statutes are alike but because the statute of Kansas contravenes the principal decided in that case, and if the law of Kansas is to be so construed then it is

certainly unconstitutional. This court has held in the case of Missouri Pacific R'y Co. *vs.* Finley, *supra*, that the railroad company can only be made liable where it knowingly brings the germs of the disease into the State. The act of Congress of May 29th, 1884, makes the railroad company liable only where it knowingly violates the law, or knowingly transports diseased cattle. Now, where in this case is the evidence showing that the railroad company knew the cattle were diseased or liable to communicate the disease of Texas fever at the time it took them for shipment?

Under the United States quarantine laws, the chief of the Bureau of Animal Industry, who is a graduated veterinary surgeon, has made a special study of the disease in order to locate the localities where it exists, and the Secretary of the Department of Agriculture prohibits the shipment of cattle from such localities, and we find that these cattle were not from any such locality, we find that under the experiments made by the chief of the Bureau of Animal Industry, with the aid of his learning and his experience, that these cattle were supposed to be safe and incapable of communicating the disease, and were proper cattle for transportation to any sec-
299 tion of the United States. This court in the opinion handed down overlooked the fact that the State veterinary of the State of Kansas did not consider these cattle dangerous, and for that reason they were not taken and quarantined as the law provides in all cases which shipped into the State are supposed to be dangerous. Is the railroad company to be held to greater care and to greater responsibility than the State veterinary or live-stock sanitary board and be made liable in cases where the State veterinary, whose education and business peculiarly fit him for the study of contagious diseases among domestic animals, thinks there is no danger, could it be held to have knowingly brought cattle capable of communicating the disease into the State when the State veterinary thinks no danger is to be apprehended, and admits the cattle over his certificate? This court further overlooked the fact in this case that the permits or certificates which were plead and which were authorized by the statute, which were duly issued by the authorized agent of the live-stock sanitary commission of the State of Kansas, were substantially health certificates which the law permits the State veterinary to issue.

In the light of the decision of this court in the case of Missouri Pacific R'y Co. *vs.* Finley, *supra*, in the light of the act of Congress of May 29th, 1884, both of which are to the effect that the railroad company can only be made liable where it knowingly brings into the State the germs of the disease, and where it acts in good faith and in ignorance of the actual facts, it cannot in any event be made liable. The permits, however informal they may have been, and we care not whether they were called permits or health certificates, were certainly competent for one purpose and that was to show the good faith of the railroad company and to show its ignorance of the actual facts relative to the dangerous character of the cattle.

300 Even if the statute had been for the violation of a criminal statute, which it was not, the permits were competent

evidence for the purpose of showing the good faith of the railroad company. No one can unconsciously commit a crime in this State, and ignorance of the fact that he is committing a crime is always a defense.

See: State *vs.* Brown, 38 Kansas, 390.

In this kind of a case it is certainly a defense unless it can be shown by the testimony that the railroad company was negligent in failing to make proper inquiry as to the character of the cattle it was to transport. The only inquiry it could properly make would be, first, are the cattle apparently healthy; and, second, are the cattle from north and west of the Government quarantine line, and there its inquiry must stop. If these two questions are answered in the affirmative, it is bound to accept the cattle for shipment and would be subject to an action for damages should it refuse.

See: Bowman *vs.* C. & N. W. R. R. Co., 125 U. S. 507.
Leisey *vs.* Hardin, 135 U. S., 100.
Furley *vs.* C. & N. W. R. R. Co., 57 N. W. R., 719.
Nytro-glycerine case, 15 Wall., 524.
Chicago & Alton R. R. Co. *vs.* Erickson, 91 Ill., 613.
Hutchinson on Carriers, section- 439 and 441.

301 No importance whatever can be attached to the fact that the railroad company solicited the shipment and named a through rate from the origin of the shipment to destination. Other railroads solicited the shipment, as is clearly shown by the testimony of Mr. Hosier. Will it be claimed for a moment that because they solicited the shipment and endeavored to get it that they too are liable in this case? That is exactly where the logic of the opinion handed down in this case will lead us if followed out to its legitimate results. They were just as willing to bring the cattle in as was the plaintiff in error in this case.

In the opinion handed down in this case this court further overlooked a question decisive of the case in this, that even though the company had violated a statute of the State of Kansas in bringing in or handling of these cattle, yet, if no damage resulted directly from its act, it cannot be held liable for damages which afterwards accrue or result from the handling of the cattle by other parties.

There is no question but what its connection with the cattle and its control over them ceased upon its delivery of them to Hosier Brothers. While the railroad company may have known of the fact that Hosier Brothers were contemplating driving the cattle through the country, yet it had no power to prevent their doing so, and was wholly indifferent whether Hosier Brothers drove them through the country or not. It probably understood that that was the intention of Hosier Brothers. It did not understand that Hosier Brothers would not change their intention and take the cattle in some other direction or leave them in the pasture at Hartford. The railroad company having no direct control over the cattle after delivering them to Hosier Brothers at Hartford, could

not be made liable by reason of any act of Hosier Brothers
302 in handling the cattle which resulted in communicating a contagious disease to native cattle coming in contact with them. This question was referred to in our former brief and the authorities thereon cited. It is true that they are from Missouri, but that is a respectable court, and the proposition decided by the court is sound and has received the sanction of the bench and bar ever since the decision was rendered. There it was held:

"Though a company may have violated the statute by bringing Texas cattle into the State, it is not liable for the spread of the disease after it has parted with them and they have been driven by the owner into another county, as each transportation is a separate offense."

Surface *vs.* H. & St. Jo. R'y Co., 60 Missouri, 216.
Wilson *vs.* K. C., St. J. & C. B. R'y Co., 60 Missouri, 195.
Surface *vs.* H. & St. J. R'y Co., 63 Missouri, 452.

The statute of Missouri directly prohibited the railroad company from transporting into the State certain cattle during certain seasons of the year, and in terms made the carrier liable for damages should it do so. But the court held that the disease causing the damage must be communicated by the cattle while in the possession of the railroad company. After it had parted with the possession of the cattle and the owner had driven them into the country and there communicated the disease to native cattle the railroad company was not liable. This seems to us to be very sound doctrine and a complete defense in this case, but was overlooked and not considered by the court though well worthy of its consideration. Our statute contains no such provision. If the doctrine announced by this court in the opinion handed down in this case is to prevail
303 and become the law of this State, then no man can safely engage to assist the owner in driving cattle from south of the south line of Kansas without making himself liable in case damages accrue. We respectfully submit that this court has misconceived the law in this case and that a rehearing should be granted. All of which is respectfully submitted.

T. N. SEDGWICK AND
L. B. KELLOGG,
Attorneys for Plaintiff in Error.

304 And afterward, on the 22nd day of May, 1896, the same being one of the regular judicial days of the January term, A. D. 1896, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Hon. David Martin, chief justice, and Hon. W. A. Johnston and Hon. S. H. Allen, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record, as follows, to wit:

THE M., K. & T. R'L'Y CO., Pl'ff in Error,
vs.
CHARLES HABER *et al.*, Def'ts in Error.
} No. 10003.

Now comes on for decision the petition for a rehearing of this cause, and thereupon it is ordered that said petition be denied.

305 And afterward, on the 12th day of September, 1896, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for the allowance of a writ of error, which is in words and figures as follows, to wit:

306 To the Honorable David Martin, chief justice of the supreme court of the State of Kansas:

Comes now the Missouri, Kansas & Texas Railway Company, a corporation duly organized and incorporated under and by virtue of the laws of the State of Kansas, by James Hagerman and T. N. Sedgwick, its attorneys, and complains that in the record and proceedings and also in the rendition of a judgment in the suit wherein The Missouri, Kansas & Texas Railway Company was plaintiff in error and Charles Haber, Thomas E. Tutt, H. R. Scroggins, Jane Jones, E. T. White; James C. Farrington and C. J. Lantry, partners as Farrington & Lantry; John P. Perrier, Dr. H. J. Fuller, H. A. Bolz, A. Murphy, D. S. Lewis, J. G. Hughes, Charles McKee, J. G. Rumford, Patrick McCormick, John Schroeder, R. Funk, Joseph Wagoner, Deitrich Fox, Mathias Maurin, Henry Merker, G. E. Bodine, Mary McClelland, Joseph Kuhlman, Joseph Bratt, D. S. Starr, L. W. Ostram, E. G. Soule, Widow Smith, Mrs. L. B. Hull, Henry Giger, Louis Heitzman, Harry Suttle, John Middaugh, Edward Jenkins, J. P. Rossillion, L. L. McKee, Christ Kruger, A. Kinnie, W. H. Watkins, J. Dunn, Little Brothers, John D. Bolton, Isaac Hawbecker, Adam Bitler, I. M. Robinson, Matthew Swager, Joseph Strutzel, John Langley, Michael Janker, Harry Soule, John Hicks, P. Reaser, J. F. Stratton, John Stottler, M. J. Collard, Carson & Osborne, H. C. Jackson, W. H. Zink, P. C. Zink, T. E. Welsh, George E. Welsh, A. A. Wilson, J. A. Thompson, George Terrell, Guy Slead, D. B. Stignor, W. A. Pease, George Parker, Peter Schlisher, John Schlisher, Marshall M. Meal, J. M. Nuremburg, G. P. Jones, Theodore Hurtig, G. O. Hughes, W. T. Hite, W. H. Hickox, James Hutton, J. W. Hughes, J. W. Hock, John Hock, D. H. Gard, E. Fulber, George Elliott, P. M. Elliott, J. L. Stratton, Lawrence Dresler, Elizabeth Davis, J. C. Cooler, G. T. Collins, G. C. Bender, John Bricker, V. G. Baysinger, Winnie Baysinger, D. S. Baysinger, C. N. Buck, C. S.
307 Bixler, Herman Brier, John Brier, Adolph Brier, W. B. Johns, Mary Westfall, Alice Sternberger, Amanda J. Jones, Mrs. W. V. Hall, Mary Conway, John Patch, John Ferren, Wm. Nichols, H. R. Williams, J. W. Ketchum, H. A. Taylor, Timothy Murphy, Davis McKee, Robert North, David McKee, Wesley Roberts, George Ward, L. Y. Cooper, Hannah Bowers, Herman Bohn, P. Montgomery, acc't J. W. Montgomery, A. T. Johnson, Alfred Marley, Anna Hughes, Otto Haber, Mrs. Martha Smith,

W. C. Phillips, John Maddox, Owen Hughes, J. J. Rumford, E. W. Everetts, L. R. Wright, A. B. Holferty, L. B. Ames, S. F. Jones, Wm. D. Dunlap, F. M. Nine, J. W. Vancleave, L. O. Olson, John Furnas, Furnas & Martindale, Dr. D. R. Gunkle, S. F. Jones, George Ward, Eureka Springs Cattle Company, August Reichart, George Atkinson, defendants in error, in said supreme court of the State of Kansas, at the January, 1896, term thereof, and in which judgment *so* rendered against the said Missouri, Kansas & Texas Railway Company, plaintiff in error, on the 11th day of April, 1896, the said Missouri, Kansas & Texas Railway Company complains that a manifest error hath been committed against it, in this, to wit: That the said Missouri, Kansas & Texas Railway Company claimed the right to ship and transport cattle as a common carrier of interstate commerce over its line of railroad from north and west of the Government quarantine line as established by the circular of the Honorable Jeremiah M. Rusk, Secretary of the Department of Agriculture, and dated February 26th, 1892, issued under and by virtue of the act of Congress of May 9th, 1894, and entitled "An act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals," and also the act of Congress of April 4th, 1891, making an appropriation for the Department of Agriculture for the fiscal year ending June 30th, 1892, and also under and by virtue of the act of Congress entitled "An act
308 to regulate commerce," approved February 4th, 1887, and amended by the act of Congress of March 2nd, 1889, and the act of Congress of February 10th, 1891, and the decision of said court was against the right as claimed by the plaintiff in error under and by virtue of the provisions of each of said acts of Congress above referred to, and its rights to ship or transport cattle as a common carrier of interstate commerce from the State of Texas north and west of the Government quarantine line as established February 26th, 1892, and from south of the south line of the State of Kansas at any time between February 1st and December 1st of any year was denied by the decision of said court in said cause.

The plaintiff in error further claimed that chapter 161, Laws of 1881; chapter 191, Laws of 1885; chapter 201, Laws of 1891, passed by the legislature of the State of Kansas, and any and all laws passed by the legislature of the State of Kansas supplemental thereto or amendatory thereof, prohibiting the shipping or transporting into the State of Kansas of cattle from south of the south line of Kansas from February 1st to December 1st of any year, is in conflict with the acts of Congress above referred to and the rules and regulations of the Department of Agriculture issued and promulgated thereunder, and as such are in conflict with the third subdivision of section 8 of article 1 of the Constitution of the United States, which provides that the Congress shall have power "to regulate commerce with foreign nations and among the several States and among the Indian tribes," and second subdivision, article 6, which reads as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

309 And the decision of the said court was against said claim of said plaintiff in error as to the constitutionality of the several acts of the legislature of the State of Kansas, and the act of plaintiff in error of which the defendants in error complain was the agency exercised by the plaintiff in error as a common carrier of interstate commerce in bringing into the State cattle under and by virtue of said acts of Congress herein referred to, and the decision of said court was against the right to exercise said authority under said acts of Congress, and was further to the effect that the Secretary of the Department of Agriculture has no power or authority under the acts of Congress to make any regulation affecting carriers of interstate commerce which would in any degree abrogate, annul, or abridge the laws of Kansas herein referred to prohibiting the importation of diseased cattle, all of which fully appears from a transcript of the record and judgment in which cause herewith submitted.

Wherefore said Missouri, Kansas & Texas Railway Company, plaintiff in error, prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

JAMES HAGERMAN AND
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

310 [Endorsed:] 10003. Filed Sep. 12, 1896. C. J. Brown, clerk sup. court.

311 And also on the 12th day of September, 1896, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error properly allowed and executed, which is in words and figures as follows, to wit:

312 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Missouri, Kansas & Texas Railway Company, plaintiff in error, and Chas. Haber, T. E. Tutt, H. R. Scroggins, Jane Jones, E. T. White; J. C. Farrington and C. J. Lantry, partners as Farrington & Lantry; J. P. Perrier, Dr. H. J. Fuller, H. A. Bolz, A. Murphy, D. S. Lewis, J. G. Hughes, Chas.

McKee, J. G. Rumford, P. McCormick, J. Schroeder, R. Funk, J. Wagoner, D. Fox, M. Maurin, H. Merker, G. E. Bodine, Mary McClelland, J. Kuhlman, J. Bratt, D. S. Starr, L. W. Ostram, E. G. Soule, Widow Smith, Mrs. L. B. Hull, H. Giger, L. Heitzman, H. Suttle, J. Middaugh, E. Jenkins, J. P. Rossillion, L. L. McKee, C. Kruger, A. Kinne, W. H. Watkins, J. Dunn, Little Bros., J. D. Bolton, I. Hawbecker, A. Bittler, I. M. Robinson, M. Swager, J. Strutzel, J. Langley, M. Janker, Harry Soule, John Hicks, S. P. Reaser, J. F. Stratton, John Stottler, M. J. Collard, Carson & Osborn, H. C. Jackson, W. H. Zink, P. C. Zink, T. E. Welch, G. E. Welch, A. A. Wilson, J. A. Thompson, Geo. Terrell, Guy Slead, D. B. Stignor, W. A. Pease, Geo. Parker, P. Schlisher, John Schlisher, M. M. Meal, J. M. Nuremburg, G. P. Jones, Theo. Hurtig, G. O. Hughes, W. T. Hite, W. H. Hickok, Jas. Hutton, J. W. Hughes, J. W. Hock, Jno. Hock, D. H. Gard, E. Fulber, Geo. Elliott, R. M. Elliott, J. L. Stratton, Lawrence Dresjer, Eliz. Davis, J. C. Cooler, G. T. Collins, G. C. Bender, John Bricker, V. G. Baysinger, Winnie Baysinger, D. S. Baysinger, A. G. Shepard, C. N. Buck, C. W. Statler, C. S. Bixler, S. A. Statler, Herman Brier, Phillips Davis, Jno. Brier, Adolph Brier, W. B. Johns, Mary Westfall, Alice Sternberger, Amanda J. Jones, Mrs. V. J. Hall, Mary Conway, Jno. Patch, Jno. Ferrin, Wm. Nichols, H. R. Williams, J. W. Ketchum, H. A. Taylor, T. Murphy, Davis McKee, R. North, David McKee, W. Roberts, Geo. Ward, L. Y. Cooper, Hannah Bowers, J. C. Van Cleave, H. Bohn, P. Montgomery, J. W. Montgomery, A. T. Johnson, W. H. Henry, A. Marley, Anna Hughes, O. Haber, Martha Smith, W. C. Phillips, Jno. Maddox, O. Hughes, J. J. Rumford, E. W. Everetts, L. R. Wright, A. B. Holferty, L. B. Ames, S. F. Jones, Wm. Dunlap, F. M. Nine, J. W. Vancleave, L. O. Olson, J. Furnas, Furnas & Martindale, D. R. Gunkle, S. F. Jones, Geo. Ward, Eureka Springs Cattle Co., Aug. Reichart, and Geo. Atkinson, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or com-
313 mission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Missouri, Kansas & Texas Railway Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same

in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of Sept., in the year of our Lord one thousand eight hundred and ninety-six.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk of the United States Circuit Court
for the District of Kansas.

Allowed by—

DAVID MARTIN,
Chief Justice of the Supreme Court of Kansas.

[Endorsed:] 1003. Filed Sep. 12, 1896. C. J. Brown, clerk sup. court.

314 And also, on the 12th day of September, 1896, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond, which, with the formal approval thereof endorsed thereon, is in words and figures as follows, to wit:

315 Know all men by these presents that we, The Missouri, Kansas & Texas Railway Company, as principal, and Lee Clark, of the city of Parsons, Labette county, Kansas, as surety, are held and firmly bound unto Charles Haber, Thomas E. Tutt, H. R. Scroggins, Jane Jones, E. T. White; James C. Farrington and C. J. Lantry, partners as Farrington & Lantry; John P. Perrier, Dr. H. J. Fuller, H. A. Bolz, A. Murphy, D. S. Lewis, J. G. Hughes, Charles McKee, J. G. Rumford, Patrick McCormick, John Scroeder, R. Funk, Joseph Wagoner, Deitrich Fox, Mathias Maurin, Henry Merker, G. E. Bodine, Mary McClelland, Joseph Kuhlman, Joseph Bratt, D. S. Starr, L. W. Ostram, E. G. Soule, Widow Smith, Mrs. L. B. Hull, Henry Giger, Louis Hitzman, Harry Suttle, John Middaugh, Edward Jenkins, J. P. Rossillion, L. L. McKee, Christ Kruger, A. Kinnie, W. H. Watkins, J. Dunn, Little Brothers, John D. Bolton, Isaac Hawbecker, Adam Bittler, I. M. Robinson, Matthew Swager, Joseph Strutzel, John Langley, Michael Janker, Harry Soule, John Hicks, P. Reaser, J. F. Stratton, John Stottler, M. J. Collard, Carson & Osborn, H. C. Jackson, W. H. Zink, P. C. Zink, T. E. Welsh, George E. Welsh, A. A. Wilson, J. A. Thompson, George Terrell, Guy Slead, D. B. Stignor, W. A. Pease, George Parker, Peter Schlisher, John Schlisher, Marshal M. Meal, J. M. Nuremburg, G. P. Jones, Theodore Hurtig, G. O. Hughes, W. T. Hite, W. H. Hickox, James Hutton, J. W. Hughes, J. W. Hock, John Hock, D. H. Gard, E. Fulber, George Elliott, P. M. Elliott, J. L. Stratton, Lawrence Dresler, Elizabeth Davis, J. C. Cooler, G. T. Collins, G. C. Bender, John Bricker, V. G. Baysinger, Winnie Baysinger, D. S. Baysinger,

C. N. Buck, C. S. Bixler, Herman Brier, John Brier, Adolph Brier, W. B. Johns, Mary Westfall, Alice Sternberger, Amanda J. Jones, Mrs. W. V. Hall, Mary Conway, John Patch, John Ferren, H. R. Williams, J. W. Ketchum, H. A. Taylor, Timothy Murphy, Davis McKee, Robert North, David McKee, Wesley Roberts, George Ward, L. Y. Cooper, Hannah Bowers, Herman Bohn, P. Montgomery, acc't J. W. Montgomery, A. T. Johnson, Alfred Marley, Anna Hughes, Otto Haber, Mrs. Martha Smith, W. C. Phillips, John Maddox, Owen Hughes, J. J. Rumford, E. W. Everetts, L. R. Wright, A. B. Holferty, L. B. Ames, S. F. Jones, Wm. Dunlap, F. M. Nine, J. W. Vancleave, L. O. Olsen, John Furnas, Furnas & Martindale, Dr. D. R. Gunkle, S. F. Jones, George Ward, Eureka Springs Cattle Company, August Reichart, George Atkinson, in the sum of five thousand dollars, to be paid to the said Charles Haber and others, their heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves, jointly and severally, and our heirs, executors, administrators, and assigns, firmly by these presents, upon the following conditions, to wit:

Whereas the above-named The Missouri, Kansas & Texas Railway Company has prosecuted a writ of error in the above cause in the Supreme Court of the United States to reverse a judgment rendered against it in the above-entitled cause by the supreme court of the State of Kansas:

Now, therefore, the conditions of this obligation are such that if the said Missouri, Kansas & Texas Railway Company shall prosecute its said writ of error and answer all costs if it shall fail to make good its plea, then this obligation shall be null and void; otherwise to remain in full force and effect.

MISSOURI, KANSAS & TEXAS
RAILWAY COMPANY,
By T. N. SEDGWICK,
Its Gen'l Attorney.
LEE CLARK.

The above bond approved by me this 12th September, 1896.
DAVID MARTIN,
Chief Justice of Supreme Court of Kansas.

316 And also on the 12th day of September, 1896, there was filed in the office of the clerk of the supreme court of the State of Kansas a stipulation concerning the security for the payment of the judgment in this cause now given and hereafter to be required, which is in words and figures as follows, to wit:

317 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
CHARLES HABER *et al.*, Defendants in Error.

Stipulation.

In view of the fact that the above-named plaintiff in error in the above cause has heretofore given a bond in the sum of one hundred thousand dollars to secure the payment of the several judgments rendered against it in the above cause, and which said bond we regard as ample security for the payment of the same—

It is now hereby stipulated that the right to demand any additional bonds shall be considered as waived until such time as the present existing bond shall become insufficient by reason of the insolvency of the sureties thereon, to wit, Wm. Martindale and H. C. Whitley, when it is agreed that the plaintiff in error shall, upon request from defendants in error or their attorneys, file an additional bond, with such additional sureties as shall be satisfactory to the clerk of the Supreme Court of the United States.

Dated September 12, 1896.

J. JAY BUCK,
E. W. CUNNINGHAM,
Attorneys for Defendants in Error.

318 And afterward, on the 13th day of September, 1896, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, which, with due acknowledgment of the service of the same endorsed thereon, is in words and figures as follows, to wit:

319 The United States of America to Charles Haber, Thomas E. Tutt, H. R. Scroggins, Jane Jones, E. T. White; James C. Farrington and C. J. Lantry, partners as Farrington & Lantry; John P. Perrier, Dr. H. J. Fuller, H. A. Bolz, A. Murphy, D. S. Lewis, J. G. Hughes, Charles McKee, J. G. Rumford, Patrick McCormick, John Schroeder, R. Funk, Joseph Wagoner, Deitrich Fox, Mathias Maurin, Henry Merker, G. E. Bodine, Mary McClelland, Joseph Kuhlman, Joseph Bratt, D. S. Starr, L. W. Ostram, E. G. Soule, Widow Smith, Mrs. L. B. Hull, Henry Giger, Louis Heitzman, Harry Suttle, John Middaugh, Edward Jenkins, J. P. Rossillion, L. L. McKee, Christ Kruger, A. Kinnie, W. H. Watkins, J. Dunn, Little Brothers, John D. Bolton, Isaac Hawbecker, Adam Bittler, I. M. Robinson, Matthew Swager, Joseph Strutzel, John Langley, Michael Janker, Harry Soule, John Hicks, P. Reaser, J. F. Stratton, John Stottler, M. J. Collard, Carsons & Osborn, H. C. Jackson, W. H. Zink, P. C. Zink, T. E.

Welsh, George E. Welsh, A. A. Wilson, J. A. Thompson, George Terrell, Guy Slead, D. B. Stignor, W. A. Pease, George Parker, Peter Schlisher, John Schlisher, Marshal M. Meal, J. M. Nuremburg, G. P. Jones, Theodore Hurtig, G. O. Hughes, W. T. Hite, W. H. Hickox, James Hutton, J. W. Hughes, J. W. Hock, John Hock, D. H. Gard, E. Fulber, George Elliott, P. M. Elliott, J. L. Stratton, Lawrence Dresler, Elizabeth Davis, J. C. Cooler, G. T. Collins, G. C. Bender, John Bricker, V. G. Baysinger, D. S. Baysinger, C. N. Buck, C. S. Bixler, Herman Brier, Adolph Brier, W. B. Johns, Mary Westfall, Alice Sternberger, Amanda J. Jones, Mrs. W. V. Hall, Mary Conway, John Patch, John Ferren, William Nichols, H. R. Williams, J. W. Ketchum, H. A. Taylor, Timothy Murphy, Davis McKee, Robert North, David McKee, Wesley Roberts, George Ward, L. Y. Cooper, Hannah Bowers, Herman Bohn, P. Montgomery, acc't J. W. Montgomery, A. T. Johnson, Alfred Marley, Anna Hughes, Otto Haber, Mrs. Martha Smith, W. C. Phillips, John Maddox, Owen Hughes, J. J. Rumford, E. W. Everetts, L. R. Wright, A. B. Holferty, L. B. Ames, S. F. Jones, Wm. Dunlap, F. M. Nine, J. W. Vancleave,
320 L. O. Olson, John Furnas, Furnas & Martindale, Dr. D. R. Gunkle, S. F. Jones, George Ward, Eureka Springs Cattle Company, August Reichart, George Atkinson:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Kansas in a cause wherein The Missouri, Kansas & Texas Railway Company is plaintiff in error and you and each of you are defendants in error, to show cause, if any there be, why the judgment in said writ of error should not be corrected and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of September, 1896.

DAVID MARTIN,
Chief Justice Supreme Court of the State of Kansas.

Service of the above citation acknowledged this 12th day of September, 1896.

EUGENE HOGAN &
MADDEN BROS.,
Attorney- for Farrington & Lantry.
J. JAY BUCK,
E. W. CUNNINGHAM,
MADDEN BROS.,
Attorneys for all Defendants in Error.

321 [Endorsed:] 10003. Filed Sep. 13, 1896. C. J. Brown, clerk sup. court.

322 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled cause as the same remain on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of supreme court of the State of Kansas affixed hereto, at my office in Topeka, this 12th day of October, 1896.

C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: Case No. 16,443. Kansas supreme court. Term No., 268. The Missouri, Kansas and Texas Railway Company, plaintiff in error, *vs.* Charles Haber *et al.* Filed December 1, 1896.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
Plaintiff in Error,

v.

CHARLES HABER, ET AL.,
Defendants in Error.

No. 664.

Motion to Advance.

Come now the defendants in error in the cause above entitled, and move the Court to advance the case on the docket for hearing on a day convenient to the Court during the present term.

The case comes here on writ of error to the Supreme Court of Kansas.

It arose upon these facts: In the spring of 1892, the plaintiff in error transported 2200 cattle from Pecos County, Texas, (north and west of the quarantine line established by the Department of Agriculture) to Hartford, Kansas. By the transportation contract the Railway Company agreed to and did deliver the cattle to Hosier Bros. the consignees, at a pasture 14 miles from its station at Hartford.

In the summer of 1892 the Railway Company was sued in a state court by Charles Haber. He alleged that said cattle were

brought into Kansas in violation of the provisions of certain statutes of that state prohibiting the importation into Kansas of cattle capable of communicating Texas fever, and that the cattle so transported by the Railway Company were infected with and communicated said disease to his cattle.

In this action 151 other cattle owners intervened under similar allegations. The case was tried in the *nisi prius* court, and judgments were there rendered against the Railway Company in favor of the plaintiff and of each intervenor. In June, 1896, these judgments were affirmed by the supreme court of Kansas.

The Railway Company in its petition for a writ of error to this court makes two questions, viz:

> FIRST. That it claimed and was denied the right to transport cattle as a common carrier of interstate commerce from north and west of the quarantine line established by the Department of Agriculture on February 22, 1892, and under the interstate commerce act, and the amendments thereto.
>
> SECOND. That Chap. 161, Laws of 1881, Chap. 191, Laws of 1885, and Chap. 201, Laws of 1891, passed by the legislature of Kansas, and which prohibit the shipment of cattle into that state from points south of the south line thereof between February 1 and December 1 of each year, are in conflict with the act to establish a Bureau of Animal Industry, &c. (23 Stat. 31), and the rules and regulations promulgated thereunder; also in conflict with the act to regulate commerce (24 Stat. 379 and its amendments); and also in conflict with the third subdivision of Section 8 of Art. 1, and the second subdivision of Art. 6 of the Federal Constitution.

These contentions challenge the validity and constitutionality of every statute of Kansas, the purpose of which is to prevent carriers and others from bringing into the state cattle affected with Texas or splenic fever.

No question of equal importance to the cattle industry of the United States could be brought here. All cattle native to

or acclimated in that part of the country lying north of the quarantine line established by the Agricultural Department and by various western states, if brought in contact with cattle native to or acclimated in that part of the country south of said line, contract the malady, and most of them die. The same catastrophe occurs—as it did in this case—if northern cattle even pass over the trail of southern cattle. Hence it is that practically every cattle owner and dealer in the west is directly interested in knowing as soon as possible whether the laws passed by many of the western states, like those in question here, are or are not in conflict with the similar federal statute, and with the clauses of the Federal Constitution above referred to.

The drastic character of these State enactments, and the universal dread of "Texas fever" felt by every farmer whose cattle are in danger of being infected with it, demonstate the keen interest of the people in, and the overwhelming and immediate importance of, the controversy involved.

It is late to ask the Court to assign the case for hearing at this term; and we venture to do so only because in an early decision lies the only chance of light to the federal and state authorities in their efforts to save the cattle in the northern states from practical extirpation by this deadly disease. If the police power of the state is helpless to protect the cattle of its citizens from destruction by this pest, Congress should be at once advised of the fact. In this case one shipment of southern cattle destroyed the property of ONE HUNDRED AND FIFTY-TWO men of the aggregate value of nearly FIFTY THOUSAND dollars. It is hardly possible to conceive of a more momentous question, either in its financial or legal phase.

Letters from the Secretary of the Department of Agriculture, and from the Governor of Kansas, printed as an *addendum* hereto, show that those distinguished executive officials feel so deeply concerned in the matter that they have ventured to strenuously urge the court to grant the application. Attention

is respectfully called to these letters, as showing that there is a deeper and larger question in the case than the monetary one; and it is suggested that the appeal to the court contained in said letters, of itself, furnishes cogent and sufficient warrant for the motion, and imperative and commanding reasons for granting it.

Notice of this motion has been accepted by the attorney for plaintiff in error, and filed with the clerk.

W. C. PERRY,
FORT SCOTT, KAN.

EUGENE HAGAN,
TOPEKA, KAN.
Attorneys for defendants in error.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Office of the Secretary,

WASHINGTON, D. C., *Feb. 3, 1897.*

Mr. C. J. LANTRY,
Riggs House,
Washington, D. C.

MY DEAR SIR:

Because you are a party in interest to the suit pending in the United States Supreme Court, in the case entitled The Missouri, Kansas & Texas Railway Company, *vs.* Chas. Haber *et. al.*, defendants in error, I make bold to write you in the interests of the cattle industry of this country, which will be much benefited if this case can be accelerated and determined one way or another at an early date.

[Here follows a statement of the facts which is omitted].

This Department fully realizes that the questions raised by the Railway Company challenge the constitutionality of all the laws passed in Kansas, the purpose of which is to prevent carriers and others bringing into the state cattle affected with Texas fever.

In view of all the questions involved, it is a matter of great importance to the Department of Agriculture and to the cattle interests of the country that this case be advanced on the calendar of the Supreme Court of the United States and determined one way or another at the earliest possible moment. It is to be hoped that the attorneys for the Railway Company will, in view of this public exigency, do all in their power to bring about the early determination of the case in issue.

Very respectfully yours,

J. STERLING MORTON,
Secretary.

TOPEKA, KANS., *January 25, 1897.*

Messrs. FARRINGTON & LANTRY,
Topeka, Kansas.

DEAR SIRS:

My attention has been called to the fact that an appeal has been taken in the case of M. K. & T. Ry. *vs.* Haber *et al.*, from the Supreme Court of this State to the Supreme Court of the United States, on the ground that it involves a federal question necessary for its determination, and as there is involved in said case the constitutionality of the Laws of the State of Kansas in relation to the importation of live stock of other States, and the rules and regulations of the sanitary live stock commission of the State, I deem it of the utmost importance that said case be advanced and taken up at an early date, as the live stock interests of the State of Kansas are of so much importance to our people as to really demand this, and the public interests are such as to really make it necessary that the case be taken up at once, and have these important questions settled.

Hoping that you will use every means to have this case taken up, so that our stock interests may be amply protected and cared for, I remain,

Sincerely yours,

J. W. LEEDY,
Gov. of the State of Kansas.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
CHARLES HABER ET AL.
No. 268.

In Error to the Supreme Court of the State of Kansas.

For convenient reference we set out here the laws of Congress and the statutes of Kansas bearing on the questions involved in this case, and referred to in our statement and argument. For statement see p. 29.

CHAP. 60. An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Agriculture shall organize in his department a Bureau of Animal Industry, and shall appoint a chief thereof, who shall be a competent veterinary surgeon, and whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country; and the Commissioner of Agriculture is hereby authorized to employ a force sufficient for this purpose, not to exceed twenty persons at any one time. The salary of the chief of said Bureau shall be three thousand dollars per annum; and the commissioner shall appoint a clerk for said Bureau, with a salary of one thousand five hundred dollars per annum.

SEC. 2. That the Commissioner of Agriculture is authorized to appoint two competent agents, who shall be practical stock-raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be, under the instructions of the Commissioner of Agriculture, to examine and report upon the best methods of treating, transporting, and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous contagious, infectious, and

communicable diseases. The compensation of said agents shall be at the rate of ten dollars per diem, with all necessary expenses, while engaged in the actual performance of their duties under this act, when absent from their usual place of business or residence as such agent.

Sec. 3. That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to co-operate in the execution and enforcement of this act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the Governor of a State or other properly constituted authorities signify their readiness to co-operate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another.

Sec. 4. That in order to promote the exportation of live stock from the United States the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are

exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require.

Sec. 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary.

Sec. 6. That no railroad company within the United States, or the owners or masters of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious or communicable disease; nor shall any person, company or corporation drive on foot or transport in private conveyance from one State or territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia: *Provided*, That the so-called splentic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections four, five, six and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

Sec. 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Sec. 8. That whenever any contagious, infectious, or communicable disease affecting domestic animals, and especially the disease known as pleuro-pneumonia, shall be brought into or shall break out in the District of Columbia, it shall be the duty of the commissioners of said District to take measures to suppress the same promptly and to prevent the same from spreading; and for this purpose the said commissioners are hereby empowered to order and require that any premises, farm, or farms where such disease exists, or has existed, be put in quarantine; to order all or any animals coming into the District to be detained at any place or places for the purpose of inspection and examination; to prescribe regulations for and to require the destruction of animals affected with contagious, infectious, or communicable disease, and for the proper disposition of their hides and carcasses; to prescribe regulations for disinfection, and such other regulations as they may deem necessary to prevent infection or contagion being communicated, and shall report to the Commissioner of Agriculture whatever they may do in pursuance of the provisions of this section.

Sec. 9. That it shall be the duty of the several United States district attorneys to prosecute all viola-

tions of this act which shall be brought to their notice or knowledge by any person making the complaint under oath; and the same shall be heard before any district or circuit court of the United States or Territorial court holden within the district in which the violation of this act has been committed.

Sec. 10. That the sum of one hundred and fifty thousand dollars, to be immediately available, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the treasury not otherwise appropriated, to carry into effect the provisions of this act.

Sec. 11. That the Commissioner of Agriculture shall report annually to Congress, at the commencement of each session, a list of the names of all persons employed, an itemized statement of all expenditures under this act, and full particulars of the means adopted and carried into effect for the suppression of contagious, infectious, or communicable diseases among domestic animals.

Approved May 29, 1884.

Extract from Appropriation Act of Congress approved March 3, 1891: —

For carrying out the provisions of the act of May 29th, 1884, establishing the Bureau of Animal Industry and the Act of August 30th, 1890, providing for an inspection of meats and animals, five hundred thousand ($500,000) dollars, and the Secretary of Agriculture is hereby authorized to use any part of this sum he may deem necessary or expedient and in such manner as he may think best to prevent the spread of pleuro-pneumonia and other diseases of animals and for this purpose to employ as many persons as he may deem necessary and to expend any part of this sum in the purchase and destruction of diseased or exposed animals and the quarantine of the same whenever in his judgment it is essential to prevent the spread of

pleuro-pneumonia or other diseases of animals from one State into another.

CHAP. CXXIV. An act to facilitate commercial, postal and military communication among the several States.

Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore: —

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination: *Provided*, That this act shall not affect any stipulation between the government of the United States and any railroad company for transportrtion or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which said railroad or connection may be proposed.

Sec. 2. And be it further enacted, that Congress may at any time alter, amend, or repeal this act.

Approved June 15, 1866.

The above is Section 5258 of the Revised Statutes of 1878.

(6754) Diseased cattle. Sec. 60. That no person or persons shall drive or cause to be driven into or through any county in this State any cattle diseased with a disease known as Texas, splenic or Spanish fever. Any person violating any provision of this act shall on conviction be adjudged guilty of a misdemeanor, and shall be fined not less than one hundred and not more than one thousand dollars, and be imprisoned in the county jail not less than thirty days and not more than one year. (Laws 1881, ch. 161, Sec. 1, March 12.)

(6755) Held until judgment rendered. Sec. 61. That upon the arrest of any person or persons charged with the violation of any of the provisions of this act, all cattle found in his or their possession shall, during the arrest and trial of the offenders, be stopped and taken charge of by the officer or person executing the warrant of arrest, to abide the judgment of the court before whom the offender or offenders shall be tried. (Laws 1881, ch. 161, Sec. 2, March 12.)

(6756) Duty of sheriff. Sec. 62. That upon a complaint made to any sheriff within the State, by any citizen thereof, that there are, within the county where said sheriff resides, wild or undomesticated cattle infected or diseased with what is commonly known as Texas, splenic or Spanish fever, said sheriff shall forthwith take charge of said cattle and corral the same, or otherwise prevent their running at large, until said complaint shall be investigated as hereinafter provided. (Laws 1881, ch. 161, Sec. 3, March 12.)

(6757) Appoint inspectors. Sec. 63. It shall be the duty of such sheriff, upon taking charge of any cattle as provided in sections two and three of this act, to immediately give notice thereof to any justice of the peace in his county; whereupon said justice shall immediately summon three resident citizens of

the county to forthwith appear before him for the purpose of inspecting such cattle; and when the persons so summoned, or other persons summoned in their stead, shall appear, it shall be the duty of the justice to administer to them an oath, in writing, that they will faithfully discharge their duties as inspectors of the cattle aforesaid, and without delay make report to him of their finding in the premises. (Laws 1881, ch. 161, Sec. 4, March 12.)

(6758) Examine and report; expenses; fees. Sec. 64. Upon taking the oath, as provided in section four of this act, said inspector shall immediately proceed to examine cattle so in the custody of the sheriff, and if upon such examination they shall find the condition of the same to be such as to endanger the health of other cattle in the vicinity by reason of probable contagion, they shall immediately report their findings to the justice aforesaid in writing, and thereupon the justice shall forthwith issue to the sheriff his order in writing, commanding him to keep such cattle in his custody and under his control until the first day of November next ensuing; and he may employ such assistance as may be required to properly care for such cattle, keeping a correct and itemized account of all such services and the cost thereof, as well as of all feed necessary to be used, and present a report thereof to the commissioners of the county at their next regular session, and if found by them to be correct and reasonable, they shall allow the same, and draw warrants upon the county treasury therefor; and the sheriff shall be allowed for his services such compensation as the commissioners shall deem reasonable, taking as a basis for their estimate the fees allowed by law for similar services; and the inspectors shall be allowed in like manner for their services not to exceed two dollars per day, for time actually spent in making the inspection, and ten cents per mile for every mile necessarily traveled in the discharge of their duties. (Laws 1881, ch. 161, Sec. 5, March 12.)

(6759) Evidence. Sec. 65. That, in the trial of

any person or persons charged with the violation of any of the provisions of this act, proof that the cattle, of which such person or persons are charged with driving are wild and of undomesticated habits, shall be taken as *prima facie* evidence that said cattle are diseased with the disease known as Texas, spenic or Spanish fever. (Laws 1881, ch. 161, Sec. 6, March 12.)

(6760) Damages. Sec. 66. Any person or persons who shall drive or cause to be driven into or through any county in this State any of the cattle mentioned in section one of this act, in voilation of this act, shall be liable to the party injured for all damages that may arise from the communication of disease from the cattle so driven, to be recovered in civil action; and the party so injured shall have a lien upon the cattle so driven. (Laws 1881, ch. 161, Sec. 7, March 12.)

(6761) Jurisdiction. Sec. 67. Justices of the peace, within their respective counties, shall have criminal jurisdiction in all cases arising under the provisions of this act. (Laws 1881, ch. 161, Sec. 8, March 12.)

(6762) County attorney. Sec. 68. It shall be the duty of the prosecuting attorney of the proper county to prosecute on behalf of the State all criminal cases arising under this act. (Laws 1881, ch. 161, Sec. 9, March 12.)

(6763) Deliver cattle to owner provided. Sec. 69. Whenever any cattle are taken by the sheriff or other officer under the provisions of this act, and shall remain in his possession, he shall, on the first day of November thereafter, deliver the same to their owner or owners, or his or their agent or agents: *Provided*, That before he shall deliver the same, all costs and expenses which have accrued by reason of the taking and detaining of such cattle as hereinbefore provided are paid into the county treasury; and in case such costs and expenses are not so paid within ten days after said first day of November, the sheriff shall advertise in the same manner as is by law provided in cases of sales of personal property that he will sell such cattle, or such portion thereof as may be necessary to pay such costs and expenses; and at the time

and place so advertised he shall proceed to sell as many of said cattle as shall be necessary to pay such costs and expenses, and out of the proceeds of such sale he shall pay such amount into the county treasury, retaining the costs of sale. (Laws 1881, ch. 161, Sec. 10, March 12.)

(6764) Construction. Sec. 70. Nothing in this act shall be construed to conflict with the provisions of section one, chapter one hundred and seventy-six, laws of 1879, or acts amendatory thereof. (Laws 1881, ch. 161, Sec. 11, March 12.)

(6769) Not driven when. Sec. 75. That no cattle from that portion of the State of Texas which lies south of the thirty-fourth degree of latitude shall be driven into the tract of country bounded as follows: Commencing at the northwest corner of Finney County, thence south on the west line of range thirty-six to the south line of the State; thence east along said south line, to the range line between ranges twenty-six and twenty-seven; thence north along said range line to the south line of township twenty-eight; thence west to the east line of Finney County; thence north along said east line to the north line of said county of Finney; thence west on said north line to the place of beginning, between the months of April and November in each year, under the penalties of this act and the act of which this is amendatory. (Laws 1883, ch. 145, Sec. 2, March 13.)

Section 6771. No person or persons shall, between the first day of February and the first day of December of any year, drive or cause to be driven into or through any county or part thereof in this State, or turn upon or cause to be turned or kept upon any highway, range, common or pasture within this State, any cattle capable of communicating or liable to impart what is known as Texas, splenic, or Spanish fever. Any person violating any provisions of this act shall upon conviction thereof be adjudged guilty of a misdemeanor, and shall for each offense be fined not less than five hundred dollars nor more than two thousand dollars, or be imprisoned in the county jail not

less than thirty days and not more than one year, or by both such fine and imprisonment. (Laws 1885, ch. 191, sec. 1, as amended by Laws of 1891, ch. 201, Sec. 1.)*

(6772) Duty of sheriff. Sec. 78. It shall be the duty of any sheriff, under sheriff, deputy sheriff or constable within this State, upon a complaint made to him by any citizen of the State, or otherwise having notice or knowledge that there are within the county where such officer resides, cattle believed to be capable of communicating or liable to impart the disease known as Texas, splenic, or Spanish fever, to forthwith take charge of and restrain such cattle under such temporary quarantine regulations as will prevent the communication of such disease, and make immediate report thereof to the live-stock sanitary commission, and such officer shall keep said cattle in custody as aforesaid until released by order of said live-stock sanitary commission, and no officer who shall take or detain any cattle under the provisions of this act shall be liable to the owner or owners of such cattle for any damages by reason of such taking or detention, or by reason of the performances of any other duty enjoined in this act. (Laws 1885, ch. 191, Sec. 2, March 12.)

Section 6773. Whenever the live-stock sanitary commission shall determine that certain cattle within the State are capable of communicating or liable of imparting Texas, splenic or Spanish fever, they shall issue their order to the sheriff or any constable of the county in which said cattle are found, commanding him to take and keep such cattle in his custody, subject to such quarantine regulations as they may pre-

* (6767.) Exempted territory. Sec. 73. That all of that portion of territory situated in Labette County, included within the following boundaries, to wit: Commencing at a point where the Neosho river crosses the south line of the State of Kansas; thence north along said river to a point where the section line between sections twenty-six and thirty-five, in township thirty-four, range twenty-one east, crosses said river; thence directly west on the section line to the half-section corner of sections twenty-eight and thirty-three in said township and range; thence directly south along the half-section lines to the southern boundary of the State of Kansas, be and the same is hereby exempted and excluded from the operations of all the provisions of an act entitled An act for the protection of stock from disease, approved February 26, 1867, and all the amendments thereto thereafter made. (Laws 1873, ch. 139, Sec. 1, March 27.)

scribe, until the first day of December next ensuing, on which date they shall direct such officer to deliver said cattle to their owner or owners, or his or their agents. Before any cattle so held shall be delivered as aforesaid, there shall be paid to said live-stock sanitary commission all the costs and expenses of taking, de taining and holding said cattle; and in case such costs and expenses are not so paid on the said first day of December, the said officer shall advertise in the same manner as is by law provided in cases of sales of personal property on execution, that he will sell such cattle, or such portions thereof as may be necessary to pay such costs and expenses, besides the expenses of such sale. And at the time and place so advertised he shall proceed to sell as many of said cattle as may be necessary to pay off such costs and expenses and the expenses of sale, and shall forthwith pay over to the live-stock sanitary commission any amount so received in excess of the legal fees and expenses of such officer. And any officer performing any of the duties enjoined in this section, or in the next preceding section of this act, shall receive the same compensation therefor as is prescribed by law for similar services; and in case such fees cannot be collected by the sale of such stock, they shall be paid by the county in which such cattle were held. (Laws 1885, ch. 191, sec. 3, as amended by Laws 1891, ch. 201, sec. 2.)

Section 6774. Any person or persons who shall drive, ship, or transport, or cause to be shipped, driven, or transported, into or through any county in this State, any cattle liable or capable of communicating Texas, splenic or Spanish fever, to any domestic cattle of this State, shall be liable to any person or persons injured thereby for all damages that they may sustain by reason of the communication of said disease, or Texas, splenic, or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction, and the parties so injured shall have a first and prior lien to all other liens for such damages on the cattle communicating the disease of Texas, splenic or Spanish fever. (Laws of 1885, ch. 191, sec. 4, as amended by Laws 1891, ch. 201, sec. 3.)

Section 6775. In the trial of any person charged with the violation of any provisions of this act, and in the trial of any civil action brought to recover damages for the communication of Texas, splenic or Spanish fever, proof that the cattle which such person or persons are charged with shipping, driving, or keeping, or which are claimed to have communicated the said diseases, were brought into this State from south of the thirty-seventh parallel of north latitude, shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offense was committed, capable of communicating and liable to impart Texas, splenic or Spanish fever, within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full knowledge and notice thereof. If the owner or owners or person or persons in charge of said cattle, shall show by such certificate or certificates, as shall hereafter be designated by the live stock sanitary commission of the State, that the said cattle had been kept since the first day of December of the previous year west of the twenty-second meridian of longitude west from Washington, and north of the thirty-fourth parallel of north latitude, the provisions of this section shall not apply thereto. (Laws 1885, ch. 191, sec. 5, as amended by Laws 1891, ch. 201, sec. 4.)

(6776) Jointly and severally liable. Sec. 82. Whenever two or more persons shall in violation of this act, at the same time or at different times during the same year, drive or cause to be driven upon the same highway, range, common or pasture within this State, any cattle capable of communicating, or liable to impart Texas, splenic or Spanish fever, they shall be jointly and severally liable for all damages that may arise from the communication of such disease at any time thereafter during the same year to any native, domestic or acclimated cattle that shall have been upon the same highway, range, common or pasture so previously traveled over by such first mentioned cattle. (Laws 1885, ch. 191, Sec. 6, March 12.)

(6777) Jurisdiction. Sec. 83. Justices of the peace within their respective counties shall have criminal jurisdiction in all cases arising under the provisions of this act. (Laws 1885, ch. 191, Sec. 7, March 12.)

(6778) County attorney. Sec. 84. It shall be the duty of the prosecuting attorney of the proper county to prosecute on behalf of the State all criminal cases arising under this act. (Laws 1885, ch. 191, Sec. 8, March 12.)

(6825) Texas fever. Sec. 131. The live-stock sanitary commission shall have power to create and enforce quarantine against the disease known as Texas, splenic or Spanish fever in any of the unorganized counties of the State. In so doing it shall have the power and as far as possible follow the terms of law and requirements of the law creating the commission. (Laws 1884, ch. 4, Sec. 1, March 26.)

(6826) Co-operation. Sec. 132. That the live-stock sanitary commission be authorized and directed to co-operate with the Commissioner of Agriculture of the United States, or any officer or authority of the general government, in the suppression and extirpation of any and all contagious diseases among domestic animals, and in the enforcement and execution of any and all acts of Congress to prevent the importation or exportation of diseased cattle, and the spread of infectious or contagious disease among domestic animals. (Laws 1884, ch. 5, Sec. 1, March 26.)

ARTICLE 11 — STATE VETERINARIAN — SANITARY COMMISSION.

Sec. 104. Appointment of State veterinarian.
105. Oath and bond of.
106. Duties of.
107. Study and investigate diseases of animals.
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109. Duties of.
110. Meetings; may establish quarantine.
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Sec. 112. Appraisement of animals.
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125. Governor declare quarantine.
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129. Act not to apply.
130. Commission administer oath.
131. Texas fever; quarantine.
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133. Tax levy to create fund.

AN ACT to provide for the appointment of a State veterinary surgeon, to prescribe his duties and fixing his compensation.

Be it enacted by the legislature of the State of Kansas:—

(6798) State veterinarian. Sec. 104. The Governor, by and with the advice and consent of the Senate, shall, immediately upon the passage of this act, appoint a competent and skilled veterinary surgeon for the State, who at the date of such appointment shall be a graduate in good standing of a recognized college of veterinary surgery, and who shall hold his office until his successor is appointed and qualified. The Governor shall also, at the regular session of the Legislature in eighteen hundred and eighty-seven, and every two years thereafter, and during a regular session of the legislature, by and with the advice and consent of the Senate, appoint a competent and skilled

veterinary surgeon for the State, having the qualifications above mentioned, whose term of office shall be fortwoyears from the first day of April next succeeding his appointment, unless sooner removed, as hereinafter provided. The veterinary surgeon for the State shall keep his office at the capital of the State, in a room to be provided by the executive council, and shall receive a salary of twenty-five hundred dollars per annum, payable as the salaries of State officers are paid, and actual necessary traveling expenses by him incurred and paid, in the discharge of his duties, to be drawn from the treasury upon itemized accounts thereof properly verified, rendered monthly, and approved by the Governor. The Governor shall have power of removal, and shall immediately fill all vacancies which may at any time occur in the office of State Veterinarian. (Laws 1884, ch. 1, Sec. 1, March 25.)

(6799) Oath and bond. Sec. 105. Before entering upon the duties of his office, the State veterinarian shall take and subscribe an oath to faithfully discharge the duties of his said office, and shall execute a bond to the State of Kansas, in the sum of five thousand dollars, with good and sufficient sureties, conditioned for the faithful performance of the duties of his office; which bond and sureties thereto shall be approved by the Governor, and said bond, together with his oath of office, shall be deposited in the office of Secretary of State. (Laws 1884, ch. 1, Sec. 2, March 25.)

(6800) Duty of. Sec. 106. It shall be the duty of the State veterinarian, under direction of the live-stock sanitary commission for the State, to investigate any and all cases of contagious or infectious diseases among domestic animals of the State, which may come to his knowledge or be brought to the notice of the live-stock sanitary commission, and for this purpose shall visit at once any locality within the State where any such contagious or infectious disease of domestic animals may be reported to exist, and make a full and careful examination of all animals supposed to be diseased, and inquire into the nature and cause

of any such disease which he may discover; prescribe the proper care, necessary remedies, and direct the sanitary measures necessary to prevent the spread thereof; and to make a full report of his findings and doings in the premises, to the live-stock sanitary commission, with recommendations and suggestions as to the means necessary to be employed to prevent the spread, and best calculated to exterminate any and all such contagious or infectious diseases, by him found to exist among the domestic animals of the State. (Laws 1884, ch. 1, Sec. 3, March 25.)

(6801) Study and investigate diseases of animals. Sec. 107. The State veterinarian shall make a continuous and scientific study and investigation of all diseases of domestic animals, and the causes, preventives and cures thereof, and report the result of his study and investigation to the Secretary of the State Board of Agriculture, giving in plain, ordinary language, the symptoms by which any such disease may be identified; how liable to be introduced and spread; the causes and conditions to which may be attributed the production of any such disease, and the sanitary and other measures best calculated to prevent the germination and spread of any such contagious or infectious disease among live stock, together with the best known treatment and remedies, also the treatment necessary in case of injury to domestic animals, in time for publication in the several reports required by law of the said State Board of Agriculture; and perform such other service and duties as may be required by law or directed by the live-stock sanitary commission in the interest of the State. (Laws 1884, ch. 1, Sec. 4, March 25.)

An Act for the protection of domestic animals.

Be it enacted by the legislature of the State of Kansas:—

(6802) Commissioners. Sec. 108. Three commissioners, to be appointed by the Governor, by and with

the advice and consent of the Senate, shall constitute the live-stock sanitary commission of the State of Kansas. Before entering upon the duties of his office, each commissioner shall take and subscribe to oath of office, and file the same with the Secretary of State, and each commissioner, before entering on the performance of his duties, shall execute a bond, to be approved by the executive council, in the sum of two thousand dollars, conditioned that he will faithfully perform the duties of his office, and file the same with the Secretary of State. The term of office of said commissioners shall be for the period of one, two and three years respectively, from the first day of April next succeeding their appointment, and the Governor shall have power to fill any vacancy in said commission. Said commissioners shall elect one of their number chairman, and the State veterinarian shall be *ex-officio* secretary of said commission. The secretary shall keep a full record of the proceedings of the commission, and make such report to the Governor as may from time to time be required, who may transmit the same to the Secretary of the State Board of Agriculture for publication. (Laws 1884, ch. 2, Sec. 1, March 25.)

(6803) Duty of. Sec. 109. It shall be the duty of the commission provided for in the first section of this act, to protect the health of the domestic animals of the State from all contagious or infectious diseases of a malignant character, and for this purpose it is hereby authorized and empowered to establish, maintain and enforce such quarantine, sanitary and other regulations as it may deem necessary. It shall be the duty of any member of said commission, upon receipt by him of reliable information of the existence, among the domestic animals of the State, of any malignant disease, to at once notify the State veterinarian, who shall go at once to the place where any such disease is alleged to exist, and make a careful examination of the animals believed to be affected with any such disease, and ascertain, in possible, what, if any, disease exists among the live stock reported to be af-

fected, and whether the same is contagious or infectious, or not; and if said disease is found to be of a malignant, contagious or infectious character, he shall direct the temporary quarantine and sanitary regulations necessary to prevent the spread of any such disease, and report his findings and actions to the commission. (Laws 1884, ch. 2, Sec. 2, March 25.)

(6804.) Meeting; establish quarantine. Sec. 110. Upon the receipt by any member of this commission of the report of the State veterinarian, provided for in section 2 of this act, if said member shall be of the opinion that the exigencies of the case require he shall immediately convene the commission at such place as he may designate, and if, upon consideration of the report of the veterinarian, the commission shall be satisfied that any contagious or infectious disease exists of a malignant character, which seriously threatens the health of domestic animals, they shall proceed at once to the infected district, ascertain and determine the premises or grounds infected, and establish the quarantine, sanitary and police regulations necessary to circumscribe and exterminate such disease; also to list and describe the domestic animals affected with such disease, and those which have been exposed thereto, and included within the infected district or premises so defined and quarantined, with such reasonable certainty as would lead to their indentification; and for that purpose the said commission may, in its discretion, cause the live stock so included within the quarantined lines established to be marked or branded in such manner as the commissioner may designate. And no domestic animal liable to become infected with the disease, or capable of communicating the same, shall be permitted to enter or leave the district, premises or grounds so quarantined, except by authority of the commission. The said commission shall also from time to time give and enforce such directions, and prescribe such rules and regulations, as to separating, mode of handling, treating, feeding and caring for such diseased and exposed animals as it shall deem necessary to prevent the two classes of

animals from coming in contact with each other, and perfectly isolate them from all other domestic animals which have not been exposed thereto, and which are susceptible of becoming infected with the disease. And the said commission, or any of the members thereof, and said veterinarian, are hereby authorized and empowered to enter upon any grounds or premises to carry out the provisions of this act. (Laws 1884, ch. 2, Sec. 3, March 25.)

(6805) Kill and destroy animals. Sec. 111. When in the opinion of the commission it shall be necessary, to prevent the further spread of any contagious or infectious disease among the live stock of the State, to destroy animals affected with or which have been exposed to any such disease, it shall determine what animals shall be killed, and appraise the same as hereinafter provided, and cause the same to be killed, and the carcasses disposed of as in its judgment will best protect the health of the domestic animals of the locality. (Laws 1884, ch. 2, Sec. 4, March 25.)

(6806) Appraisement. Sec. 112. Whenever, as in the fourth section of this act provided, the commission shall direct the killing of any domestic animal or animals, it shall be the duty of the commissioners to appraise the animal or animals to be killed, and shall make an inventory of the animal or animals condemned, and in fixing the value thereof the commissioners shall be governed by the value of said animal or animals at the date of appraisement: *Provided*, That no animal or animals shall be appraised except those affected with contagious pleuro-pneumonia of cattle, or foot-and-mouth disease, or such as have been exposed thereto. (Law 1884, ch. 2, Sec. 5, March 25.)

(6807) Quarantine established; notice. Sec. 113. When the commission shall have determined the quarantine and other regulations necessary to prevent the spread among domestic animals of any malignant, contagious or infectious disease found to exist among the live stock of the State, and given its order as herein-

before provided, prescribing quarantine and other regulations, it shall notify the Governor thereof, who shall issue his proclamation, proclaiming the boundary of such quarantine, and the orders, rules and regulations prescribed by the commission, which proclamation may be published by written or printed handbills posted within the boundaries or on the lines of the district, premises, places or grounds quarantined, or by being published in the official State paper: *Provided*, That if the commission decide that it is not necessary, by reason of the limited extent of the district in which such disease exists, that a proclamation should be issued, then none shall be issued; but such commission shall give such notice as may to it seem best to make the quarantine established by it effective. (Laws 1884, ch. 2, Sec. 6, March 25).

(6808) Assistants; supplies. Sec. 114. The commission provided for in this act shall have power to employ at the expense of the State such persons, and purchase such supplies and material, as may be necessary to carry into full effect all orders by it given, as hereinbefore provided. *Provided*, That no labor shall be employed nor material or supplies purchased by the commission except such additional labor, material and supplies as may be necessary to carry into effect the quarantine and other regulations prescribed by the commission. (Laws 1884, ch. 2, Sec. 7, March 25.)

(6809) Railroads; duty. Sec. 115. It shall be the duty of the railway corporations doing business in this State to cleanse and disinfect the cars used by them in transporting stock in this State, at such times and places as the commission may designate, whenever in the opinion of the commission any such order may be necessary to prevent the spread of infectious or contagious diseases. Any such corporation violating any of the provisions of this section shall be liable to a penalty of five hundred dollars for each offense, to be recovered in a civil action to be prosecuted under the direction of the attorney general, in the name of the State of Kansas. (Laws 1884, ch. 2, Sec. 8, March 25.)

(6810) Pay for animals. Sec. 116. When any animal or animals are killed under the provisions of this act by order of the commission, the owner thereof shall be paid therefor the appraised value as fixed by the appraisement hereinbefore provided for. *Provided*, The right of indemnity on account of animals killed by order of the commission under the provisions of this act, shall not extend to the owner of animals which have been brought into the State in a diseased condition, or from a State, country, territory, or district, in which the disease with which the animal is infected, or to which it has been exposed, exists. Nor shall any animal be paid for by the State which may be brought into the State in violation of any law or quarantine regulation thereof, or the owner of which shall have violated any of the provisions of this act, or disregarded any rule, regulation or order of the live-stock sanitary commission, or any member thereof. Nor shall any animal be paid for by the State which came into the possession of the claimant with the claimant's knowledge that such animal was diseased or was suspected of being diseased, or of having been exposed to any contagious or infectious disease. Nor shall any animal belonging to the United States be paid for by the State. (Laws 1884, ch. 2, Sec. 9, March 25.)

(6811) Report disease. Sec. 117. It shall be the duty of any owner or person in charge of any domestic animal or animals who discovers, suspects or has reason to believe that any of his domestic animals, or domestic animals in his charge, are affected with any contagious or infectious disease, to immediately report such fact, belief or suspicion to the commission, or any member thereof, and to the sheriff and county clerk of the county in which such domestic animal is found; and it shall be the duty of any person who discovers the existence of any contagious or infectious disease among the domestic animals of another, to report the same at once to the sheriff and county clerk of the county in which such domestic animal is found. (Laws 1884, ch. 2, Sec. 10, March 25.)

(6812) Duty of sheriff. Sec. 118. The sheriff to whom the existence of any infectious or contagious disease of domestic animals is reported, shall forthwith proceed to the place where such domestic animal is and examine the same, and forthwith report the result of such examination to the commission, or any member thereof, and shall prescribe such temporary quarantine regulations as will prevent the spread of the contagion or infection until the live stock sanitary commission can provide and order suitable quarantine rules and regulations. (Laws 1884, ch. 2, Sec. 11, March 25.)

(6813) Bringing into State. Sec. 119. Any person who shall knowingly bring into this State any domestic animal which is affected with any contagious or infectious disease, or any animal which has been exposed to any contagious or infectious disease, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than five hundred nor more than five thousand dollars. (Laws 1884, ch. 2, Sec. 12, March 25.)

(6814) Examination. Sec. 120. Any person who owns, or is in possession of live stock, which is, or which is suspected or reported to be affected with any infectious or contagious disease, who shall refuse to allow the State veterinarian, or other authorized officer or officers, to examine such stock, or shall hinder, or obstruct the State veterinarian, or other authorized officer or officers, in any examination of, or in an attempt to examine, such stock, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars. (Laws 1884, ch. 2, Sec. 13, March 25.)

(6815) Misdemeanor under act. Sec. 121. Any person who shall have in his possession any domestic animal affected with any contagious or infectious disease, knowing such animal to be so affected, or after having received notice that such animal is so affected, who shall permit such animal to run at large, or who

shall keep such animal where other domestic animals not affected by or previously exposed to such disease may be exposed to its contagion or infection, or who shall sell, ship, drive, trade or give away such diseased animal or animals which may have been exposed to such infection or contagion, or who shall move or drive any domestic animal in violation of any direction, rule, regulation or order establishing and regulating quarantine, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars for each of such diseased or exposed domestic animals which he shall permit to run at large, or keep, or sell, ship, drive, trade, or give away in violation of the provisions of this act: *Provided*, That any owner of any domestic animal which has been affected with or exposed to any contagious or infectious disease may dispose of the same, after having obtained from the State veterinarian a bill of health for such animal. (Laws 1884, ch. 2, Sec. 14, March 25.)

(6816) Certificates for animal. Sec. 122. When any live stock shall be appraised and killed by order of the commission, it shall issue to the owner of the live stock so killed, a certificate, showing the number and kind of animals killed, and the amount to which the holder is entitled, and report the same to the auditor of State. And upon presentation of such certificate to the auditor, he shall draw his warrant on the treasurer for the amount therein stated, payable out of any money appropriated for the payment of such claims. (Laws 1884, ch. 2, Sec. 15, March 25.)

(6817) Construction. Sec. 123. The provisions of this act shall not be construed to include any other than contagious and infectious diseases, nor shall it be construed as to interfere in any manner with the provision of chapter one hundred and forty-four, Session Laws of eighteen hundred and eighty-three. (Laws 1884, ch. 2, Sec. 16, March 25.)

(6818) Compensation. Sec. 124. The members

of the commission, appointed by the Governor as hereinbefore provided, shall receive five dollars per day for the time by them necessarily employed in the discharge of the duties required by this act. And each member of the commission hereinbefore provided for shall receive the actual necessary traveling expenses by him incurred and paid in the discharge of the duties required of him by the provisions of this act, which said per diem and expenses shall be drawn from the treasury on the warrant of the auditor, to be issued on the filing in his office of an itemized account thereof, properly verified. (Laws 1884, ch. 2, Sec. 17, March 25.)

(6819) Declare quarantine, when. Sec. 125. Whenever the Governor of the State shall have good reason to believe that any dangerous, contagious or infectious disease has become epizootic in certain localities in other States, Territories, or countries, or that there are conditions which render such domestic animals from such infected districts liable to convey such disease, he shall, by proclamation, prohibit the importation of any live stock of the kind diseased into the State, unless accompanied by a certificate of health, given by a duly authorized veterinary inspector; and all such animals arriving in this State shall be examined without delay by the State veterinary surgeon, and, if deemed necessary, placed in close quarantine until all danger of infection is passed, when they shall be released by the order of the veterinary surgeon or the live stock commission. (Laws 1884, ch. 2, Sec. 18, March 25.)

(5820) Owners of stock yards. Sec. 126. That the owners of any stock yards doing business in this State, when requested by the live-stock sanitary commission, shall appoint and keep constantly in their employ at their expense, a competent inspector of live stock, whose duty it shall be to daily inspect with care, all animals brought into the stock yards in whose employ any such inspector may be; and upon the discovery, by such inspector, in such yards, of any animal

affected with any malignant, contagious or infectious disease, he shall direct the manner in which any such diseased animal shall be disposed of so as to prevent the spread of any such contagious or infectious disease, and for this purpose may cause any such diseased animals to be killed and the carcasses to be disposed of at the expense of the owner thereof, in such manner as will prevent the spread of any such disease; but in no event shall any such diseased stock be permitted to be driven or shipped out of any such stock yards, except to some rendering establishment, or other suitable place for killing and disposing of such diseased animal as hereinbefore provided for, and then under such regulations and restrictions as may be necessary to prevent the spread of the disease on account of which any such animals have been condemned. *Provided*, That the owner of any animal or animals ordered to be destroyed by any inspector shall have the right to appeal from any decision of such inspector to the State veterinarian of the State live-stock sanitary commission; and during the pendency of such appeal, the condemned animals shall be kept in strict quarantine at the expense of the owner thereof, unless the State veterinarian shall decide such stock is not so diseased, then said expenses shall be paid by the owners of such stock yards: and *provided further*, that no compensation shall be made by the State to owners of diseased live stock found in public stock yards and destroyed as herein provided. The inspector of live stock, in any stock yards in this State, shall, on demand of the owner of any live stock passing through any such stock yards, furnish to said owner a bill of health for any live stock by him inspected as hereinbefore required, and found to be healthy. (Laws 1884, ch. 2, Sec. 19, March 25).

(6821) Officers' duties. Sec. 127. The commissioners shall have the power to call upon any sheriff, under sheriff, deputy sheriff or constable to execute their orders, and such officers shall obey the orders of said commissioners, and the officers performing such duties shall receive compensation therefor as is prescribed by law for like

services, to be paid as other expenses of said commission as hereinbefore provided; and any officer may arrest on view, and take before any magistrate of the county, any person found violating the provisions of this act, and such officer shall immediately notify the county attorney of such arrest, and he shall prosecute the person so offending according to law. (Laws 1884, ch. 2, Sec. 20, March 25.)

(6822) Penalty. Sec. 128. Except as otherwise provided in this act, any person who shall violate, disregard, or evade, or attempt to violate, disregard or evade any of the provisions of this act, or who shall violate, disregard, or evade, or attempt to violate, disregard or evade any of the rules, regulations, orders or directions of the live-stock sanitary commission establishing and governing quarantine, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred nor more than five thousand dollars. (Laws 1884, ch. 2, Sec. 21, March 25.)

(6823) Act not apply. Sec. 129. The provisions of this act shall not apply to sheep and hogs, except when affected or exposed to foot-and-mouth disease, or to cattle when affected by the disease known as Spanish or Texas fever. (Laws 1884, ch. 2, Sec. 22, March 25.)

(6824) Oaths. Sec. 130. For the purposes of this act each member of the live-stock sanitary commission is hereby authorized and empowered to administer oaths and affirmations. (Laws 1884, ch. 2, Sec. 23, March 25.)

STATEMENT.

I.

By this proceeding in error, the Missouri, Kansas & Texas Railway Company, plaintiff in error here, and defendant in the courts below, seeks to reverse the judgment of the Supreme Court of Kansas in affirming the judgments of the District Court of Lyon County, Kansas, in favor of the plaintiff and 140 other persons who were joined as defendants in the District Court, and each of whom filed cross-petitions claiming affirmative relief as authorized by the laws of Kansas. The judgments below amounted, in the aggregate, to about $45,178.19.

The pleadings, as disclosed by the record, consisted of the amended petition of the plaintiff Haber (Trans., pp. 7–9) filed December 4th, 1893, and the answer and cross-petitions of the defendants Lantry and Farrington and H. R. Scroggins (Trans., pp. 10–13) and the answer and cross-petitions of the other defendants except the railway company, about 140 in number, and which were exactly like that of Scroggins and Brother, except that different amounts of damages were claimed, and for different cattle (Trans., pp. 14–16) and the amended answer of the Missouri, Kansas & Texas Railway Company to the petition and all of the cross-petitions (Trans., pp. 19-23).

The amended petition of the plaintiff Haber alleged that the defendants Missouri, Kansas & Texas Railway Company, Hosier Brothers (a cattle firm composed of E. A. and George B. Hosier), Francis Brogan, W. J. Brogan and Joseph N. Brogan, between April 1st and July 15th, 1892, transported, drove and brought 2,300 head of Texas cattle

belonging to Hosier Brothers from a point in Texas south of the 37th parallel of the north latitude in the State of Kansas in violation of an act of the legislature of the State of Kansas entitled "An Act for the Protection of Cattle against Contagious Diseases," and known as Chap. 161 of the Laws of 1881 and acts amendatory thereof and supplemental and additional thereto, to Hartford, Kansas, and from Hartford, through the county of Lyon, into the county of Chase, in the State of Kansas, and kept the said cattle upon the same highway, range, common and pasture with the cattle of plaintiff. That the cattle had the disease known as the Texas, splenic or Spanish fever, and were capable of communicating the same to the domestic cattle of Kansas, and before said cattle were shipped, transported and driven and kept said defendants had knowledge, and were put upon dutible inquiry, and had reason to know that said Texas cattle were of a kind capable of communicating, and liable to communicate, such disease to the cattle of the plaintiff, and that such Texas cattle communicated the Texas splenic or Spanish fever to the plaintiff's cattle, from which they sickened and died, and plaintiff was damaged thereby in the sum of $2,500. That said Texas cattle were taken and held in quarantine by the sheriff of Chase County, Kansas, at the commencement of plaintiff's suit, and thereafter, by agreement of all the parties, the court in this cause appointed one T. J. Acheson as its receiver, who took the cattle from the sheriff, and, by consent of all the parties in interest, and upon the order of the court, said receiver had sold said cattle, and had instead thereof the money and proceeds received from said sale. The plaintiff further alleged that the defendants Thomas E. Tutt and D. L. Jones & Brother Live Stock and Commission Company pretended to have some lien upon the fund in the hands of the receiver by virtue of chattel mortgages, but that said claim was inferior and

subordinate to plaintiff's. The petition further alleged that all the other defendants named in the caption of the petition including all the cross-petitioners had an interest in, and claim upon the fund on account of losses of cattle sustained by them because of the said disease of Texas or Spanish fever having been communicated to their cattle by the said Texas cattle. The plaintiff claimed a lien upon the fund in the hand of the receiver by reason of the facts pleaded, as given by the statutes of Kansas above referred to, and in the prayer of the petition the plaintiff demanded judgment against the defendants Hosier Brothers, Missouri, Kansas & Texas Railway Company, Francis Brogan, W. J. Brogan and Joseph N. Brogan in the sum of $3,000 together with the costs of the suit, and asked that the same be adjudged and admitted a lien upon the aforesaid fund prior and superior to any claim made by said defendants Tutt and D. L. Jones & Brother Live Stock and Commission Company, and for all further and proper relief. The statutes of Kansas referred to in Haber's petition are hereinbefore set out in full as part of this statement, pp. 8–15.

The answer and cross-petition of Lantry and Farrington made substantially the same averments as contained in Haber's petition as to the said defendants Hosier Brothers, Missouri, Kansas & Texas Railway Company and the Brogans bringing the cattle into the State, and alleged that the cattle were infected with the disease known as the Texas or Spanish fever and communicated the same to their cattle, and that prior to the commencement of this suit they had brought an attachment suit against the defendants Hosier Brothers and the Brogans in the Chase County District Court, and the sheriff had, under such attachment, levied on the Texas cattle of Hosier Brothers, and that, by reason of such levy, they had the first lien on the said cattle, or the proceeds thereof, and in the prayer of their cross-petition they demanded judgment against the

said defendants Hosier Brothers, the Railway Company and the Brogans for $30,130, and that the same be adjudged a first lien prior and superior to any claim made by any of the parties to this suit.

The answer and cross-petition of H. R. Scroggins reaverred the allegations of Haber's petition, and alleged that the said Texas cattle of Hosier Brothers communicated the Texas or Spanish fever to his cattle to his damage in the sum of $3,550, and prayed a personal judgment therefor against Hosier Brothers, the Railway Company and the Brogans, and that the same be declared a first and prior lien on the money in the hands of the receiver.

The remaining 140 defendants filed separate answers and cross-petitions similar to that of Scroggins, claiming judgments for their damages in varying sums, as shown on pages 14 to 16 of the record.

The answer of the Missouri, Kansas & Texas Railway Company to the petition of the plaintiff Haber, and to the answers and cross-petitions of each and all of the other defendants who had filed cross-petitions demanding affirmative relief, denied each and every allegation in said petition, and in each of said answers and cross-petitions contained, except such as were therein expressly admitted, modified or differently stated. This answer alleged that the defendant was a corporation of the State of Kansas. That during the year 1892 it owned and operated a line of railroad extending from Denison, Texas, to Hannibal, Missouri, and running through the States of Kansas and Missouri, and through the Indian Territory, with a branch from Parsons, Kansas, to Junction City, Kansas, making about 1,200 miles of railway, and that during the year 1892 it was engaged as a common carrier of freight and passenger business, and, as such common carrier, conducted an interstate transportation business. That by the terms of its charter it was a

common carrier of freight and passengers, and had no authority or power to engage in any other business. That The Missouri, Kansas and Texas Railway Company of Texas was a Texas railroad company, with a line of road extending from Denison to Taylor, Texas, and a common carrier of freight and passengers, and a line of road under a separate and distinct management from the Missouri, Kansas & Texas Railway Company, the Kansas corporation. The answer further alleged that the Texas & Pacific Railway Company was a corporation under and by virtue of the laws of the United States, and had a line of railroad extending from Marshall, Texas, to El Paso, Texas, crossing and intersecting The Missouri, Kansas & Texas Railway Company of Texas at Ft. Worth, Texas, and was a common carrier of both freight and passengers. That the town or station of Midland, Texas, was situated on the Texas and Pacific Railway 307 miles west of the station of Ft. Worth, and the same distance west of the line of The Missouri, Kansas & Texas Railway Company, of Texas, and that the lines of the two Missouri, Kansas & Texas railways connected at or near Denison, Texas. The answer further alleged that on April 28, 1892, April 29, 1892, and June 10, 1892, the defendants Hosier Brothers entered into written contracts with the Texas & Pacific Railway Company to transport for them on the first named date 744 head of cattle, and on the second date 644 head of cattle, and on the third date 485 head of cattle. Copies of said contracts were attached to the answer, marked Exhibits A, B, C, D, and L respectively, and made parts thereof. These contracts are bills of lading found at page 26 of the printed record, and were executed at Midland, Texas, and are contracts to transport the cattle from Midland, Texas, to Hartford, Kansas, with the usual clause that the Texas & Pacific Railway Company should not be liable beyond the termination of its own line. The answer

further alleged that Hosier Brothers loaded said cattle into cars furnished to them at Midland, Texas, by the said Texas & Pacific Railway Company, and said cattle were carried to Hartford, Kansas, in the same identical cars into which they were loaded. That Hartford, Kansas, is situated on the line of the Missouri, Kansas & Texas Railway Company in Lyon County, Kansas, and there is no other railway running to said town of Hartford, and that because of that fact it was necessary that the cattle be carried a portion of the distance over the line of the Missouri, Kansas & Texas railway, and the direct line, as well as the quickest, was to deliver them to The Missouri, Kansas & Texas Railway Company of Texas at Ft. Worth, and to the Missouri, Kansas & Texas Railway Company, the Kansas corporation, at or near Denison. The answer further alleged that the Missouri, Kansas & Texas Railway Company received these cattle from the Missouri, Kansas & Texas Railway Company of Texas at Denison as a connecting carrier, and discharged its full duty by transporting the same as quickly as possible and deliver in the same to Hosier Brothers at Hartford, and upon the delivery of the cattle to Hosier Brothers it discharged it full duty, and had no further connection with, or inte est in, the said cattle. The answer further alleged that the defendant had no line of railway running into or through Chase County, Kansas, and that it had nothing whatever to do with the driving of the cattle from Hartford to the Brogan pastures in Chase County, Kansas, nor did it have any connection whatever with the person or persons who drove said cattle across the country from the station of Hartford to the Brogan pasture. As a further defense, the answer pleaded that on February 26, 1892, the Hon. Jeremiah M. Rusk, as Secretary of the Department of Agriculture of the United States, issued and served upon all the railway companies of the United

States, including the Missouri, Kansas & Texas Railway Company, his regulations concerning the transportation of cattle. A copy of said regulations was attached to the answer and marked Exhibit E. That said circular letter establishing regulations concerning the transportation of cattle, was issued in accordance with Sec. 7 of the act of Congress of May 29, 1884, entitled "An Act for the Establishment of a Bureau of Animal Industry to Prevent the Exportation of Diseased Cattle, and to Provide Means for the Suppression and Extirpation of Pleuro-pneumonia and other Contagious Diseases Among Domestic Animals," and of the Act of Congress, approved March 3, 1891, making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1892, which rules and regulations removed all restrictions from the transportation of cattle to and from any portion of the United States except that portion described in said regulations as the area within which the disease known as the splenetic or Southern (meaning Texas splenic or Spanish) fever exists among cattle. The answer further alleged that Midland, Texas, the point from where said cattle was shipped, was wholly outside of the infected district as described in the regulations of the Secretary of the Department of Agriculture, and that said cattle had been kept in Pecos County, Texas, since the 1st day of December, 1891, and had not been east or south of the government quarantine line as established February 26, 1892, by the Department of Agriculture since said December 1, 1891, as would fully appear from the affidavits of M. T. Wilson, T. Ramsey and George B. Hosier dated April 30, 1892, a copy of which was attached and marked Exhibit G and made a part of the answer as were also the affidavits of J. F. Camp, D. G. Franks and George B. Hosier dated June 1, 1892, attached to the answer and marked Exhibit H, and made a part thereof. The answer

also alleged that before the defendant railway company would receive the cattle in question for shipment it compelled Hosier Brothers, the owners of said cattle, to procure from Albert Dean, live stock inspector of the Bureau of Animal Industry, acting under authority of the Department of Agriculture of the United States, permission to ship said cattle into the State of Kansas, and also to procure permission from the State Board of Live Stock Sanitary Commissioners of the State of Kansas to ship said cattle into that State. That said permission from the State Board of Live Stock Sanitary Commissioners was in writing, and the said Albert Dean, under and by virtue of his position and appointment of inspector of the Bureau of Animal Industry, of the United States, and under and by virtue of an appointment from the State Board of Live Stock Sanitary Commissioners of the State of Kansas, had authority to issue such permits. That on the 24th of April, 1892, the said Albert Dean, as such live stock inspector, and by virtue of the authority aforesaid, issued to said Hosier Brothers permission to bring the cattle in question into the State of Kansas over the lines of the Missouri, Kansas & Texas Railway Company, a copy of which permission was attached to the answer and marked Exhibit I, and made a part thereof. That thereafter, on June 3, 1892, by special direction of the Board of Live Stock Sanitary Commissioners of the State of Kansas, said Albert Dean, as such Live Stock Inspector, issued a further permit to said Hosier Brothers to bring into the State of Kansas over the line of the Missouri, Kansas & Texas Railway Company 500 head of cattle, being the cattle in question, a copy of which permit was marked Exhibit J, and was attached to the answer and made a part thereof. The answer further alleged that the defendant railway company never was at any time advised or notified from any source whatsoever that said cattle were infected with Texas or Spanish fever,

or that they were cattle that would be likely to spread the fever or disease known as the Texas or Spanish fever, and that by virtue of its relation to the public as a common carrier, it was bound to receive and transport said cattle.

The regulations concerning cattle transportation issued by the Department of Agriculture under date of February 26, 1892, as alleged in said answer, and Exhibit E thereof, are hereinafter set out. See Assignment of Errors, No. 3, *post*, pp. 51–56. The regulations with accompanying maps describe the area of country which was infected with Texas or Spanish fever and prohibits railroad companies from transporting cattle from that area between March 1st and December 1st, 1892, and therefore necessarily permitted the transportation of cattle not within the infected district.

The affidavits referred to in the answer of Camp, Franks and Hosier, as Exhibit G, and of Wilson and Ramsey and Hosier as Exhibit H, appear at pages 24 and 25 of the Transcript of Record, and they state that the cattle therein referred to, giving their brands, were owned by Hosier Brothers, of Jackson County, Missouri, and that they had been held in a pasture, under a lease by Hosier Brothers, in the county of Pecos, Texas, since the 1st of December, 1891, and that said cattle were healthy and had not come in contact with, or been exposed in any manner to, any cattle that had come east or south of the quarantine line established February 26, 1892, by the United States Department of Agriculture, since the 1st day of February, 1892, and that no contagious or infectious disease to which cattle are subject was known to exist in said pasture or vicinity, and the affidavits of Camp, Franks, Wilson and Ramsey further stated that they were not interested in said cattle as owners or otherwise, and that they were citizens of the county of Pecos, Texas.

Exhibits I and J referred to in the answer, being the

permits of Albert Dean, Inspector, were issued by order of the Live Stock Sanitary Commission of Kansas under the dates of April 24, 1892, and June 3, 1892, and state that the Missouri, Kansas & Texas Railway Company is permitted to ship the cattle of Hosier Brothers to Hartford, Kansas, as the cattle are shown by affidavits to be from Pecos County, Texas.

The map showing the boundary line of the district infected with splenetic or Southern fever of cattle, as defined in the circular orders of Hon. Jeremiah M. Rusk, Secretary of the Department of Agriculture, dated February 26, 1892, is found in the record at page 244, and from that map it appears that Pecos County and Midland station on the Texas & Pacific Railway were each west of the quarantine line, and not within the infected district.

The issues joined by the pleadings between the railway company, the plaintiff and cross-petitioners, were tried together before the court and jury, and on the trial the plaintiff and the cross-petitioners each and all offered testimony showing that Hosier Brothers drove the cattle from their range in Pecos County, Texas, to Midland station on the Texas & Pacific road, and that they were transported by the Texas and Pacific Railway Company, The Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company, the Kansas corporation, to Hartford, Lyon County, Kansas, a station on the last named road, and there delivered to Hosier Brothers, who accepted them and drove them west across Lyon County into Chase County, Kansas, and further offered testimony tending to show that the cattle of the plaintiff and the cross-petitioners respectively caught the Texas or Spanish fever communicated by these Texas cattle of Hosier Brothers while they were being driven across the country from Hartford to the Brogan pasture and while on the pasture.

The defendant railway company introduced testimony showing that the Texas cattle in question belonged to Hosier Brothers, and were held by them in Pecos County, Texas, west of the quarantine line established by the regulations of the Department of Agriculture and not within the infected district since prior to December 1, 1891, and that they were delivered to the Texas & Pacific Company at Midland, and transported thence on the bills of lading of the Texas & Pacific Company introduced in evidence to Hartford, Kansas, having been delivered at Ft. Worth, Texas, to The Missouri, Kansas & Texas Railway Company of Texas, and by that company to the Missouri, Kansas & Texas Railway Company, the Kansas corporation, at the northern line of the State of Texas, near Denison, and transported by the last named company to the station of Hartford, Kansas, in Lyon County, and there delivered to and accepted by Hosier Brothers. That the defendant railway company, its officers and agents, had no knowledge or information that said cattle were in any manner diseased or capable of communicating the Spanish or Texas fever, and that they did not communicate while on their journey, or while in the possession of the railway company, such fever to any other cattle, and that the disease, if any was communicated to other cattle, was so communicated after the defendant railway company had parted with the possession of the Texas cattle. The defendant company introduced in evidence the map found at page 244 of the record showing the boundary line of the district infected with splenic or Southern (that is Texas or Spanish) fever, which map shows that Pecos County and Midland station are west of and not within the infected district.

There was no substantial testimony that the defendant, its officers, agents or employees had any reason to suppose that the Texas cattle were capable of communicating the

Texas fever, and the contrary was clearly established. The only ground on which the claimants contended that the defendant ought to have known was that there were ticks on the Texas cattle which the company could have discovered, and the presence of ticks indicated that the cattle were capable of communicating the disease. The undisputed testimony, however, shows that ticks were common to all cattle during the summer months, and that only experts could detect the differences between the ticks which indicate Texas fever and those which do not (Tr. 154–155, 157). Indeed the claimant's testimony by which they claimed to have established the fact that their cattle were infected or killed by Texas fever was that of expert witnesses, who testified that only by *post-mortem* examinations could it be told that the cattle died from Texas fever; and such *post-mortems* were made (Tr., 148–150).

The testimony offered by the defendant company (Tr. 256–258) proved that the government quarantine line was established far enough west and north to be perfectly safe, and was put in safe territory about two counties from the actually infected district, and that at the time it was established by the officers of the Bureau of Animal Industry there were present representatives of the Sanitary Boards from the Territory of New Mexico and the States of Kansas, Missouri, Wyoming, Illinois and Indiana, and they all concluded and agreed that the line was right and far enough west (Tr., 250).

The defendant company also proved that Hosier Bros. had, during the years 1891, 1892 and 1893, shipped other cattle from their ranch in Pecos Co., Texas, by different railroads to points in Kansas, and that such cattle never communicated the Texas or Spanish fever to the domestic cattle, and that cattle had been so shipped by others from that ranch to Kansas for four or five years prior to 1891, and never communicated the disease to the Kansas cattle.

The defendant company's testimony in full is found in Tr., pp. 177 to 263.

During the progress of the trial the defendant railroad company offered in evidence and asked to be permitted to read to the jury the circular orders of February 26th, 1892, issued by the Department of Agriculture, "Exhibit E" to the answer of said company (see Assignment of Errors, No. 3, *post*, pp. 51-56), and the plaintiff objected to its introduction as incompetent, irrelevant and immaterial and upon no other ground, which objection was sustained by the court, to which action of the court the defendant at the same time excepted.

The defendant railway company further offered to prove by witnesses, A. T. Drew (see Tr., 232) and M. Sweeney (Tr., 212), that it had strictly complied in the shipments of the cattle in question from Texas to Kansas with the rules and regulations of the Secretary of Agriculture of the United States, and the court excluded such proof on the objection of the plaintiff and cross-petitioners, to which action the defendant company at the time excepted.

The defendant having proved that Albert Dean was the duly authorized Inspector of the Bureau of Animal Industry of the Department of Agriculture, and also the live stock inspector of the State of Kansas, offered in testimony two permits, one dated April 24th, 1892, and the other June 3d, 1892, of the Live Stock Sanitary Commission, signed by said Dean by order of said commission, to ship the Texas cattle in question from Texas to Kansas, the cattle being from Pecos Co., Texas (Tr., p. 29), and which permits are hereinafter set out. See Assignment of Errors, No. 11, *post*, pp. 68-69. The trial court refused to admit such testimony and the defendant duly excepted.

At the conclusion of the evidence the defendant railway company requested the court to give the special instruc-

tions to the jury set forth hereafter, — see Assignment of Errors No. 5, *post*, pp. 56–61.

The District Court charged the jury by giving the instructions hereinafter set out. (See assignment of errors No. 6, *post*, pp. 61–67) To the giving and refusing of the instruc tions and each of them the defendant company at the time duly excepted.

From an examination of the instructions refused it will be seen that the trial court refused to instruct the jury that defendant was not liable under the Kansas statute for its act in transporting the Texas cattle from Texas to Kansas, and that such transportation was authorized, required and justified by the laws of the United States, which were paramount to the Kansas statutes.

The instructions given declared the defendant company liable if it brought the cattle from below the south line of Kansas and could have known that the same were liable to communicate the disease of Texas fever; that the fact that the cattle were brought from south of the south line of Kansas was *prima facie* evidence that they were capable of communicating the disease of Texas fever, and that the defendant company had knowledge thereof; and that the defendant company was liable though the disease was communicated to the domestic cattle after the Texas cattle had left its possession and control.

Thereupon the jury returned separate verdicts in favor of the plaintiff and the cross-petitioners against the railway company in varying amounts set forth at page 270 of the record and aggregating about $45,178.19.

As authorized by the laws of Kansas the defendant railway company asked the jury to make certain special findings and return with their verdict, which findings were by the court submitted to the jury, and the answers of the jury to such findings were rendered with their general verdict.

The special questions submitted, and the answers of the jury thereto, are in words and figures as follows: —

"Comes now the Missouri, Kansas and Texas Railway Company, one of the defendants in the above-entitled cause, and asks the court to require the jury to answer the following special questions and return same into court with their verdict in this cause: —

1. Did the railroad company have any actual notice that these cattle or any of them were from the infected district of Texas?

Answer. No.

2. If you answer the above question "Yes," you may then state what agent, servant or employee of the railroad company had such notice or knowledge.

Answer.

3. Did any of the agents, servants, or employees of the railroad company having charge of the handling of the trains in which these cattle were carried have any information or knowledge concerning Texas or splenetic fever?

Answer. We don't know.

4. If you answer the above question "Yes," you may then state what agent, servant, or employee of the company had such information or knowledge.

Answer.

5. Is it not a fact that Francis Brogan did understand by the contract with Hosier Brothers that he was to receive the cattle at either Hartford, Olpe, or Bazaar, as Hosier Brothers might elect?

Answer. Yes.

6. Was not the talk he had with Williams after he had made the contract with Hosier Brothers?

Answer. Yes.

7. What effort would have been necessary for the railroad company to make to ascertain that these cattle were not proper cattle to be shipped north, or that any of them had been in the infected area immediately prior to the shipment thereof?

Answer. They should make a thorough investigation.

8. Did not Hosier Brothers send two men with each train of cattle and was it not the duty of such men to look after and care for the cattle?

Answer. Yes.

9. Did the trainmen or employees of the defendant in charge of the train have anything to do with the handling of the cattle or with the loading or unloading of them?

Answer. No.

10. Was it not the duty of the trainmen in charge of the train in which the Hosier Brothers cattle were shipped to simply look after the management and operation of the train?

Answer. Yes.

11. Is it not a fact that all the information given to the railroad company by Hosier Brothers and by Francis Brogan was to the effect that said cattle were from Pecos County, Texas?

Answer. Yes.

12. Is it not a fact that by the rules and regulations of the Honorable Jeremiah M. Rusk, Secretary of the Department of Agriculture, establishing a quarantine line, Pecos County, Texas, was entirely west and outside of said line?

Answer. Yes; we suppose so.

13. What difference is there between a Texas cattle fever tick and any other kind of tick?

Answer. We don't know.

14. Is it not a fact that Texas fever can be communicated to native cattle by other means than the Texas cattle tick?

Answer. Yes.

15. Is it not a fact that cattle from north and west of the government quarantine line are not supposed by the Bureau of Animal Industry to be inoculated with germs of Texas fever and are supposed to be incapable of communicating it to native cattle?

Answer. Yes; that's the supposition.

16. You may state the distance from Fort Worth to Midland, Texas?

Answer. 307 miles.

17. You may state the distance from Fort Worth to Denison?

Answer. 96 miles.

18. You may state the distance from Denison, Texas, to Hartford, Kansas?

Answer. 344 miles.

19. You may state the distance from Midland, Texas, to the north line of Pecos County, Texas?

Answer. We don't know.

20. Is it not a fact that the ranch and range of Hosier Brothers is located entirely within the boundaries of Pecos County, Texas?

Answer. The ranch is in Pecos County, Texas.

21. Is is not a fact that the Bureau of Animal Industry kept an inspector at Fort Worth, Texas, and one at Parsons, Kansas, whose duty it was to inspect all cattle shipped north over the lines of the railroad company through those places and to stop all cattle coming from inside of the quarantine line or infected area?

Answer. Yes.

22. Is it not a fact that said inspectors determined by the brands of cattle whether they are from north and west of the government quarantine line?

Answer. Yes.

23. Is it not a fact that these cattle were branded with Hosier Brothers' brand?

Answer. The most of them.

24. Was not said brand registered in Pecos County, Texas?

Answer. We don't know.

25. Did not such brands indicate that said cattle were from west of the government quarantine line?

Answer. Yes.

26. Is it not a fact that the railroad company delivered the cattle to Hosier Brothers at Hartford, and until after such delivery no Texas fever was communicated by them and no damage done to the plaintiff or any of the claimants suing under their cross-petitions?

Answer. Yes.

27. If you find that the cattle communicated Texas fever, is it not a fact that such fever was communicated by the drive across the country from Hartford to the Brogan pasture, in Chase County, and the placing of the cattle in such pasture?

Answer. Yes.

28. Who were the owners of these cattle at the time they were driven from Hartford to the Brogan pasture?

Answer. Hosier Bros.

29. Is it not a fact that Hosier Brothers, the owners of the cattle, by their agents, the Brogans, drove the cattle from Hartford to the Brogan pasture?

Answer. Yes; it is alleged so.

30. How many years have Hosier Brothers been shipping cattle from Pecos County, Texas?

Answer. Three years.

31. Did said cattle ever communicate Texas fever at any other time than the time of the shipment to Hosier Brothers at Hartford, Kansas?

Answer. We don't know.

32. Is it not a fact that the defendant The Missouri, Kansas and Texas Railway Company in its business of a common carrier transport cattle every year from Texas under the government quarantine regulations?

Answer: Yes; we suppose so.

33. Does not the defendant The Missouri, Kansas and Texas Railway Company make all reasonable effort to fully comply with and observe all the quarantine regulations promulgated and put in force by the Secretary of the Department of Agriculture, and to observe all the rules and regulations put in force by the State board of live-stock sanitary commissioners of Kansas?

Answer. We don't know, but they had ought to.

34. Is it not a fact that of the cattle transported from the State of Texas over the lines of the Missouri, Kansas and Texas Railway Company that this is the only instance in which any contagious disease was communicated by said cattle?

Answer. We don't know of any other.

B. W. Jay, Foreman.

It will be observed that these special findings are to the effect that the railway company had no connection with the Texas cattle complained of except to transport them from Texas to Hartford station, Kansas: that the cattle were brought from Pecos County, Texas, west of the infected district, established by the Department of Agriculture of the United States: that the cattle were during their entire journey in charge of and cared for by the agents of Hosier Bros., and loaded and unloaded by them: that the company did not know that the cattle were capable of communicating the Texas fever to Kansas domestic cattle: that the Texas cattle while en route and in the possession or under the control of the railway company did not communicate the Texas or Spanish fever to any other cattle; and finally that the Texas cattle did not communicate the Texas or Spanish fever to the cattle of plaintiff or cross-petitioners until after the railroad journey had ended and they had been delivered to and accepted by Hosier Bros.

Under the laws of Kansas the special verdicts control the general verdicts where there is conflict. See Section 4382 G. S. Kansas (1889).

The defendant railway company in due time moved the court for judgment in favor of the railway company upon the special verdicts, notwithstanding the general verdicts, which motion was overruled and to which the company at the time duly excepted.

The defendant railway company also filed motion for new trial which was overruled and due exception taken. Judgments having been rendered against the railway company in favor of the plaintiff and the cross-petitioners, the railway company duly prosecuted its appeal to the Supreme Court of the State, assigning in conformity to the laws of the State that the District Court had erred in rendering judgments against the defendant railway company instead of in its favor, and had erred in refusing to admit the testi-

mony offered and in giving and refusing the instructions hereinafter specifically set forth in the assignment of errors and the Supreme Court, after a full hearing of the case, affirmed the judgments of the court below in an opinion which is found at pages 284 to 297 of the record. The railway company thereupon filed in the Supreme Court a petition and argument for rehearing, which is found at pages 298 to 320 of the printed record. The petition for rehearing was overruled and thereupon the defendant railway company filed its petition for writ of error, which is found at pages 321 to 323, and the writ of error was duly allowed and issued (see Record, 327 and 328).

At every step and stage of the case the defendant company denied liability under the Kansas statute, asserted its acts in connection with the cattle to be that of interstate transportation, authorized, justified and required by Federal laws, and that all State laws attempting to fix responsibility on defendant were void as in conflict with the constitution and laws of the United States.

The opinion of the Supreme Court of Kansas distinctly held that the defendant was liable for the cattle injured by the communication of the Texas fever under Section 3 of Laws of Kansas, 1891, being the general statute 6774 (*supra*, 13), though the Texas cattle were brought into Kansas from a point not within the infected district as fixed by the Federal authorities, and though they had left its possession and control prior to the time when the disease was communicated and the damage done. The opinion also held that the constitution and laws of the United States, notably the act creating the Bureau of Animal Industry (*supra*, pp. 2 to 6) and the regulations of the Secretary of Agriculture thereunder, did not authorize or justify the railway company in bringing the Texas cattle from Texas to Kansas. It further held that there was no conflict between the State law and the Federal law.

The ultimate question to be decided by this court is whether the defendant railway company which simply acted as an agency of interstate commerce in bringing the cattle in question from Texas to Kansas can be held responsible under the Kansas statute for damages resulting to other cattle in Kansas to which the Texas fever was communicated long after the Texas cattle had passed from the possession or control of the defendant railway company.

We shall contend that the defendant company is not liable for the injuries to the cattle of the claimants under the Kansas statutes.

1. Because the Kansas statute: Sections 6774 *et seq.* hereinbefore quoted in full (*supra*, pp. 13 to 15), in so far as they attempt to base liability of the defendant on the transportation of the cattle from Texas to Kansas is void as an attempted regulation of interstate commerce and in conflict with the constitution of the United States which confers upon Congress exclusive jurisdiction over such commerce.

2. Because Congress by the act of May 29th, 1884, creating the Bureau of Animal Industry (*supra*, pp. 2 to 6), has provided for the regulation of the transportation of diseased cattle or cattle liable to communicate the Texas or Spanish fever from one State to another, and such legislation is exclusive and the statutes of Kansas are void in so far as they attempt to deal with that question, and hence cannot be the foundation for any cause of action against the defendant company.

3. Because under the constitution and laws of the United States, notably the commerce clause of the constitution, the interstate commerce act and the act of Congress of June 15th, 1866, to facilitate commercial, postal and military communication among the several States (*supra*,

p. 7), the defendant railway company not only was authorized and justified but required to transport the Texas cattle in question from Texas to Kansas.

4. Because even if the Texas cattle in question were capable of communicating the Texas or Spanish fever to the Kansas cattle and the defendant company knew that fact (which it did not as conclusively shown by the special findings of the jury), then the liability of the defendant company, if any, could be based only on the Federal law and not on the State law. If as in the opinion of the Supreme Court of Kansas (Tr. 289-297) intimated, the defendant violated Sec. 6 of the act of Congress of May 29th, 1884, in transporting the Texas cattle, then the defendant could be sued therefor only under the Federal statute, and if such suit had been brought the defendant company would have had the right to remove the case to the United States Circuit Court of Kansas and had it there tried according to the methods of procedure of that court. It is a universal and fundamental rule of pleading in Kansas as elsewhere that when a suit is founded upon a statute the same must be plead. The claimants have never sued on the Federal statute but have sued alone on the Kansas statute.

5. Because under the express provisions of the Federal constitution, section 2, article 6, it is provided that the constitution and laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding, which provision the Supreme Court of Kansas failed to recognize and enforce in this case.

ASSIGNMENT OF ERRORS.

1. The Supreme Court of Kansas erred in affirming each and all of the judgments of the District Court of Lyon County, in favor of plaintiff and cross-petitioners and against the defendant railway company.

2. The Supreme Court erred in refusing to reverse each and every of said judgments of the said District Court.

3. The Supreme Court erred in refusing to reverse the judgments of the said District Court for its refusal to admit in evidence the regulations of the Department of Agriculture of the United States, which are in words and figures as follows:—

Exhibit E.

REGULATIONS CONCERNING CATTLE TRANSPORTATION.

U. S. DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., February 26, 1892.

To the Managers and Agents of Railroad and Transportation Companies of the United States, Stockmen and Others:—

The regulations concerning cattle transportation issued by this Department January 11, 1892, are hereby revoked, and the following prescribed in place thereof:—

In accordance with section 7 of the act of Congress approved May 29, 1884, entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-

pneumonia and other contagious diseases of domestic animals," and of the act of Congress approved March 4, 1891, making appropriation for the Department of Agriculture for the fiscal year ending June 30, 1892, *you are hereby notified that a contagious and infectious disease known as splenetic or Southern fever exists among cattle in the following-described area of the United States:—*

All that country lying east and south of a line commencing at the southwest corner of Valverde County, State of Texas, on the Rio Grande River; thence running northerly along the western boundaries of Valverde and Crockett Counties, to the northwest corner of Crockett County; thence easterly along the northern boundaries of Crockett and Schleicher Counties to the southeastern corner of Irion County; thence northerly along the eastern boundary of Irion County to the northeast corner of said county; thence northerly to the southern boundary of Coke County; thence westerly to the southwestern corner of Coke County; thence northerly along the western boundary of Coke County to the southern boundary of Mitchell County; thence easterly to the southeast corner of Mitchell County, and thence northerly along the western boundaries of Nolan and Fisher Counties to the southern boundary of Kent County; thence easterly along the southern boundary of Kent County to the southwestern corner of Stonewall County; thence northerly along the western boundary of Stonewall County to the southeastern corner of Dickens County; thence easterly along the northern boundary of Stonewall County to the southwestern corner of Knox County; thence northerly along the western boundaries of Knox and Hardeman Counties to the Red River; thence northwesterly following the Red River to its point of intersection with the one hundredth meridian of longitude; thence northerly from said point of intersection along said one hundredth meridian to the southern boundary of the State of Kansas; thence easterly along the southern boundary of the State of Kansas to the northeast corner of the Indian Territory; thence southerly along

the eastern boundary of the Indian Territory to the southwest corner of the State of Missouri; thence easterly along the southern boundary of the State of Missouri to the Mississippi River; thence running southerly along the Mississippi River to the southwestern corner of the county of Lauderdale, State of Tennessee; thence running easterly, following the southern boundaries of the counties of Lauderdale, Crockett, Gibson, Carroll, Benton, Perry, Lewis, Maurey, Marshall, Bedford, Coffee, Grundy, Sequatchie, Hamilton, Meigs, Mc Minn, and Monroe, State of Tennessee, to the eastern boundary of said State; thence following the northern boundaries of the counties of Cherokee, Macon, Jackson, Transylvania, and Henderson, State of North Carolina, to the southeast corner of the county of Buncombe of said State; thence in a northeasterly direction, following the Blue Ridge Mountains, to the southwestern corner of the county of Madison, State of Virginia; thence easterly along the southern boundaries of the counties of Madison, Culpeper, and Stafford; thence northerly along the eastern boundary of Stafford County to the Potomac River; thence following the Potomac River southerly to the Chesapeake Bay; thence easterly along the southern boundary of the State of Maryland to the Atlantic Ocean.

From the 1st day of March to the 1st day of December, 1892, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except by rail for immediate slaughter, and when so transported the following regulations must be observed:—

1. When any cattle in course of transportation from said area are unloaded north or west of this line to be fed or watered, the places where said cattle are to be so fed or watered shall be set apart and no other cattle shall be admitted thereto.

2. On unloading said cattle at their points of destination, pens shall be set apart to receive them, and no other cattle shall be admitted to said pens; and the

regulations relating to the movement of Texas cattle, prescribed by the cattle sanitary officers of the State where unloaded, shall be carefully observed. The cars that have carried said stock shall be cleansed and disinfected before they are again used to transport, store, or shelter animals or merchandise.

3. All cars carrying cattle from said area shall bear placards stating that said cars contain Southern cattle, and each of the waybills of said shipments shall have a note upon its face with a similar statement. Whenever any cattle have come from said area and shall be reshipped from any point at which they have been unloaded to other points of destination, the cars carrying said animals shall bear similar placards with like statements, and the waybills be so stamped. At whatever point these cattle are unloaded they shall be placed in separate pens, to which no other cattle shall be admitted.

4. The cars used to transport such animals, and the pens in which they are fed and watered, and the pens set apart for their reception at points of destination, shall be disinfected in the following manner: —

(*a*) Remove all litter and manure. This litter and manure may be disinfected by mixing it with lime, or diluted sulphuric acid, or, if not disinfected, it may be stored where no cattle can come into contact with it until after December 1.

(*b*) Wash the cars and the feeding and watering troughs with water until clean.

(*c*) Saturate the walls and floors of the cars and fencing troughs and chutes of the pens with a solution made by dissolving four ounces of chloride of lime to each gallon of water. Or disinfect the cars with a jet of steam under a pressure of not less than fifty pounds to the square inch.

5. It is expressly provided that cattle may be moved from those counties in the State of Tennessee which lie south of the line hereinabove described to those

counties lying north of said line in said State, for grazing purposes, in accordance with the regulations of the authorities of the State of Tennessee.

6. It is further expressly provided that cattle which have been at least ninety days in the counties of Coke, the eastern portion of Tom Green, Nolan, Fisher, Stonewall, Haskell, Knox, and Hardeman, State of Texas, which lie within the above-described area, may be moved from said counties by rail into the States of Colorado, Wyoming, and Montana, in accordance with the regulations made by said States for the admission of Southern cattle thereto: *Provided*—

(1) That cattle from said area shall go into said States only for slaughter or grazing, and shall on no account be shipped from said States into any other State or Territory of the United States before the 1st day of December, 1892.

(2) That such cattle shall not be allowed in pens or on trails or on ranges that are to be occupied or crossed by cattle going to the Eastern markets before December 1, 1892, and that these two classes of cattle shall not be allowed to come into contact.

3. That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by these regulations.

(4) That the State authorities of the States of Colorado, Wyoming, and Montana agree to enforce these provisions.

The losses resulting yearly to the owners of susceptible cattle, both in the interstate and export trade, by the contraction of this disease from exposure in unclean and infected cars and pens, and by means of the manure carried in unclean cars from place to place, have become a matter of grave and serious concern to the cattle industry of the United States. It is absolutely essential therefore that this cattle industry should be protected as far as possible by separating the dangerous cattle and by the adoption of efficient methods of disinfection.

Inspectors will be instructed to see that disinfection is properly done, and it is expected that transportation

companies will promptly put into operation the above methods.

Very respectfully,
J. M. Rusk,
Secretary.

4. The Supreme Court erred in refusing to reverse the judgments of said District Court for its refusal to admit the testimony of A. T. Drew and M. Sweeney to the effect that the defendant railway company in the shipment of the Texas cattle in question conformed to the foregoing regulations of the Department of Agriculture.

5. The Supreme Court erred in refusing to reverse the judgments of the said District Court for its failure to give each and every of the following instructions to the jury requested by the defendant railway company, viz.:—

"In this case the plaintiff, Charles Haber, brings his action against the Missouri, Kansas & Texas Railway Company and others to recover the sum of $3,000.00, which he alleges in his petition is the amount of damage which he sustained by reason of the loss of certain of his cattle which he claims died of the disease known as Texas fever, and that said disease was communicated to his cattle by cattle from the State of Texas, which he alleges were transported into the State of Kansas by the Missouri, Kansas & Texas Railway Company, in violation of law, with the knowledge on the part of said railway company that said cattle so transported by it were inoculated with germs of Texas fever, and that if such fact was not known to the said railway company, its agents, servants, and employees, that by ordinary care and diligence such facts might have been known to it."

The defendant in its answer sets up a general denial of all the allegations of the plaintiff's petition. It further sets up as a defense to the allegations of the plaintiff's petition the rules and regulations established

by the Secretary of the Department of Agriculture, in accordance with power given him by the act of Congress of May 29th, 1884, entitled 'An act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals,' and subsequent acts of Congress upon the same subject supplemental or amendatory thereof. The defendant also relies upon certain permits which were issued to the owners of the cattle by the State Board of live-stock sanitary commissioners, which are to the effect that said cattle might be brought into the State of Kansas over the lines of the Missouri, Kansas and Texas Railway Company; also that there is misjoinder, and that by reason of such misjoinder this court has no jurisdiction; also the further defense that this case has been settled or agreed to be settled between the claimant and Hosier Brothers, who, it is alleged in the petition of the plaintiff, are jointly liable with the defendant. To this answer reply has been filed by plaintiff denying all the allegations therein contained.

There is no controversy but what the rules of the Secretary of the Department of Agriculture were substantially complied with. There is no controversy but what the permits alleged in the answer of the defendant were duly issued to Hosier Brothers, the owners of the cattle, by order of the State Board of live-stock sanitary commissioners.

The law of Congress of May 29th, 1884, provides that it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of contagious diseases, and to certify such rules and regulations to the executive authority of each State and Territory and invite such authorities to co-operate with him in the execution and enforcement thereof. Said act further provides that the plans and methods of the Commissioner of Agriculture may be accepted by any State or Territory.

It appears that the plans and methods of the Secretary of the Department of Agriculture were duly accepted by an act of the legislature of the State of Kansas entitled 'An act authorizing the live-stock sanitary commissioners to co-operate with the Federal authorities and accepting the provisions of an act of Congress to provide for the suppression of contagious diseases among domestic animals,' approved March 26th, 1884; and that since said time the said board of live-stock sanitary commissioners have been co-operating with the Federal authorities under the rules and regulations prescribed by the Department of Agriculture for the suppression and extirpation of diseases among domestic animals.

You are further instructed that by virtue of said law of Congress and by virtue of the act of the legislature of the State of Kansas of March 26th, 1884, to which your attention has been called, the rules and regulations adopted by the Department of Agriculture became a portion of the governing law of the State of Kansas upon this subject, and that under and by virtue of the act of Congress herein referred to the Secretary of the Department of Agriculture has the power to establish a quarantine line and to declare in what portion of the country pleuro-pneumonia and other contagious diseases exist, and that on February 26th, 1892, he established such quarantine line, and due notice thereof was given to all transportation companies in the United States, and such quarantine line under the act of the legislature herein referred to became the quarantine line of the State of Kansas.

You are further instructed that railroad companies or other transportation companies cannot refuse to receive cattle and transport them when originating north or west of the quarantine line as then established by the Department of Agriculture.

You are further instructed that the railroad companies or transportation companies cannot, when cattle are tendered them for shipment outside of the quarantine line, make any inquiry in regard to the health and condition of the cattle further than to disclose the

fact that the cattle are apparently healthy and that they have been kept north and west of the quarantine line." [Tr. 263–264.]

Which the court refused to do; to which action of the court in refusing to give said special instructions the defendant the Missouri, Kansas and Texas Railway Company at the time duly excepted.

And thereupon the said defendant requested the court to instruct the jury to find for the defendant the Missouri, Kansas and Texas Railway Company; which said instruction the said court refused to give; to which action of the court in refusing to give said instruction the defendant the Missouri, Kansas and Texas Railway Company at the time duly excepted. [Tr. 264–265.]

And thereupon the said defendant requested the court to give the jury the following special instructions which the court refused to do, to wit:—

"Before you can find for the plaintiff in this case you must find that the agents, servants, and employees of the defendant in charge of the trains bringing said cattle into Kansas had such knowledge of Texas cattle and the disease known as Texas fever, that they could, in the ordinary discharge of their duties in handling said trains, have discovered the fact that such cattle were inoculated with fever and were liable to communicate the disease to native cattle; and if you find that the agents, servants, and employees of the defendant did not have such knowledge, or that such knowledge was not brought to the attention of the railway company, you will find for the defendant company." [Tr. 265.]

"If you find that the defendant company received the cattle at Denison, Texas, from a connecting carrier and transported the same in the ordinary way, and the only negligence of which the plaintiff complained is that the employees of the defendant in handling the trains in which these cattle were carried did not dis-

cover that they were of a kind calculated to communicate Texas fever, and the railroad company was guilty of no improper conduct in carrying or handling said cattle by which the fever was communicated to the plaintiff's cattle and the cattle of the other complainants, you will then and in that case find for the defendant company." (Tr. 265.)

"If you find from all the evidence in this case that the railroad company unloaded the cattle at the station of Hartford, as under its contract with Hosier Brothers it was bound to do, and that the fever was occasioned entirely by the driving of said cattle across the country from Hartford to the Brogan pasture at Bazaar, in that case you will find for the defendant company." (Tr. 265.)

"You are further instructed that it is not presumed that the agents, servants, and employees of the defendant company had any knowledge of Texas cattle or the locality they are from or whether they are liable to communicate Texas fever or not, unless it is shown affirmatively that they had some special knowledge of the disease known as Texas fever, and if you find that the agents, servants, and employees had no such special knowledge, then you will find for the defendant company." (Tr. 265.)

"If you find that the permits had been duly issued by the State board of live-stock sanitary commissioners to Hosier Brothers to bring these cattle into the State of Kansas over the lines of the Missouri, Kansas and Texas Railway Company, you will in that event find for the defendant company, unless you find that such permits were fraudulently obtained or issued and that the railroad company knew that fact, or unless you further find that the railroad company knew that the permits had been wrongfully or mistakenly issued." (Tr. 265–266.)

To which action of the court in refusing to give each of the above instructions defendant company at the time excepted.

And the defendant company also requested the court to give the following special instructions:—

1. "You are instructed that the shipment of the cattle in question over the defendant's road from Denison, Texas, to Hartfoad, Kansas, was an act of interstate commerce, and that, as to such shipment, the authority of the United States government and its rules and regulations established by its Bureau of Animal Industry under the act of Congress creating such bureau are paramount to the authority of the State of Kansas, and, in case of a conflict between the rules and regulations of the United States and those of the State in relation to this cattle shipment, the State laws and regulations must give way.

2. "If you believe from the evidence that the defendant in good faith complied with the laws and regulations of the United States government in regard to the shipment of the Hosier cattle, and had the regular permit from the government inspector, then you will find for the defendant.

3. "If the permits from the general government and the State live-stock sanitary commission were duly issued to Hosier Bros. and accepted by the R. R. Co. in good faith, and the shipments made thereunder by the railroad company without any actual knowledge that the Hosier cattle were capable of communicating the disease of Texas fever, you will find for the defendant, because under such circumstances the said permits furnished to the R. R. Co. complete protection."

The court refused to give each and every of the instructions above set forth, and to the action of the court the defendant railway company at the time excepted. (Tr. 266.)

6. The Supreme Court erred in not reversing the judgment of said court for its erroneous charge given to the jury as follows:—

"1. It appears that Hosier Bros., defendants herein, in the spring of 1892, owned and controlled a ranch consisting of many thousands of acres in Pecos County, Texas, upon which were grazed and permitted to range unrestrained many thousand head of Texas cattle; that in April of said year the said Hosier Bros., entered into a contract with F. Brogan & Sons, of Hartford, Lyon County, Kansas, whereby said Brogan & Sons were to receive from said Hosier Bros. about 2,500 head of the said Texas cattle at some point in said Lyon County, to be by the Brogans taken to their ranch in Chase County, Kansas, and there grazed by them during the summer of 1892; that in compliance with the said agreement the said Hosier Bros. caused to be shipped of said cattle from said Pecos County, Texas, over the Missouri, Kansas & Texas Railway, defendant, into Kansas in the spring and summer of 1892, about 2,500 head of the said Texas cattle, which cattle were delivered by the said defendant railway company at Hartford, Kansas, in its stock yards, to said Brogan & Sons, and were by them driven through Lyon and Chase Counties to their said range, in said Chase County, Kansas. These cattle the plaintiff herein and the said cross-petitioners herein, seeking to recover in this action against the said defendant railway company, allege communicated to the domestic cattle of the said plaintiff and the said cross-petitioners the Texas, splenic, or Spanish fever, and this action is brought and prosecuted to recover of said defendant railway company the damages which they allege they suffered by reason of the said Texas cattle communicating to their cattle the said Texas, splenic, or Spanish fever.

There are other defendants in the action than the said railway company from whom the plaintiff and the cross-petitioning defendants claim they are also entitled to recover damages, but the issue now submitted to you is only as to the liability of the defendant railway company to this plaintiff and said cross-petitioning defendants and the amount of such liability, if anything.

2. The defendant denies its liability to the plaintiff herein or to any of the cross-petitioners for any sum whatever."

"3. The statute of Kansas provides that any person or persons who shall drive, ship, or transport or cause to be driven, shipped, or transported into or through any county in the State any cattle liable to or capable of communicating Texas, splenic, or Spanish fever to any domestic cattle of this State shall be liable to any person or persons injured thereby for all damages they may sustain by reason of the communication of said disease of Texas, splenic, or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction. The term 'persons' in this law means corporations as well as natural persons.

"4. The mere fact that the cattle of the plaintiff or those of any of the cross-petitioning defendants became sick and died from this disease imparted to them by cattle transported by the said defendant into Lyon or Chase Counties is not sufficient to warrant a finding against said defendant railway company. You must find from the evidence, first, that Texas cattle were, in fact, brought into this State. Of this there is no denial and you can consider that fact as established. Second, that the cattle of the plaintiff, and each of the cross-petitioning defendants, who seek to recover herein against said railway because of the loss of cattle, became infected and died because of the disease imparted to them by such Texas cattle, and that such disease was Texas, splenic, or Spanish fever; and, third, that the officers, employees, or agents of the railway company, defendant, had knowledge that such Texas cattle transported by it to this State were liable to impart such disease to the native cattle of this State, or that they ought, by the exercise of diligence and care to have known of the dangerous character of these cattle, and that they would or were liable to impart said disease to the native cattle of this State.

"5. The statute of this State makes the fact of bringing any cattle from south of the south line of

Kansas, between the first day of February and the first day of December, *prima facie* evidence that such cattle were capable of communicating and liable to impart Texas, splenic, or Spanish fever, and that the person in charge of such cattle had full knowledge and notice of their ability to impart such disease to the native cattle."

"6. It is claimed by the plaintiff and the cross-petitions of defendants that the presence of what is known as the Texas cattle tick on cattle recently brought from the southern portions of Texas indicates that such cattle are capable of and liable to impart the Texas fever to the native cattle of this State, and that these Hosier cattle had such ticks on them. If you find from the evidence that these Hosier cattle, brought from Pecos County, Texas, at the season they were brought, had upon them Texas cattle ticks, and were capable of or liable to communicate the Texas, splenic, or Spanish fever to domestic cattle in Kansas, it became the duty of the railroad company, its servants, agents, or employees, to exercise due care and caution to ascertain the presence of such ticks, and it was their duty to examine such cattle to ascertain whether or not they were present. They could not shut their eyes or fail to investigate and then claim that they were not aware of the dangerous character of these cattle. The railway company, defendant, is charged with the knowledge that a reasonable and fair examination and inquiry made by it, its employees and agents, would have imparted and with the knowledge of any fact which, by the exercise of ordinary care and diligence, it would have learned.

"7. The defendant railway company set out in its answer certain so-called permits, issued by the Live Stock Sanitary Commission of the State of Kansas, permitting the shipment of these cattle. The court instructs you that, even if the cattle therein described were the ones actually shipped by the company to Hartford, yet such permits would constitute no defense, as there is no warrant or authority in the law

authorizing the issuance of any such permits, and, notwithstanding the issuance of such permits, the railway company would be liable the same as though they had not been issued, provided you should find they are liable at all.

"8. You are further instructed that it is immaterial whether or not the Hosier Brothers had a contract with the defendant railroad company to bring these cattle from Midland, Texas. The fact that it did bring them from some point on its line of road south of the south line of Kansas makes it liable, provided it had knowledge, if such is the fact, of the dangerous character of these cattle, or ought to have known it under the instructions heretofore given you.

"9. It is the duty of any one in the pursuit of any lawful business to exercise due care and caution that others shall not be injured thereby; and while a common carrier, such as is the defendant railway company, is bound to accept for transportation any freight tendered it which it may be lawful to carry, it must exercise due care and caution in doing this that it does not invade the rights of others, and it is not required to take for transportation or to transport any article forbidden by the law to be transported or the transportation of which will injure others, provided it can ascertain by due diligence that such article is liable to injure or cause damage to those with whom it may come in contact during its transportation or at its destination.

"10. If you find from the evidence that the defendant railway company is liable, then you will return a verdict in favor of the plaintiff, assessing his damages at the amount heretofore fixed by the arbitration commissioners, and you will also return a verdict in favor of each of the cross-petitioning defendants who suffered damages by reason of the introduction of the Texas fever by the Hosier cattle in the amount fixed by said commissioners where the same has been fixed, and in the cases where such amount has not been so fixed,

then in the amount you find such defendants ought to recover from the evidence.

"11. The issues raised by the cross-petition of F. Brogan and Sons and Hosier Brothers are not submitted to you.

"12. It is not necessary in order to enable the plaintiff and cross-petitioners to recover from the defendant railway company that said company, its agents or employees, should have actual knowledge that these cattle which it transported to Hartford were dangerous or liable to communicate to native cattle the Texas fever. It is sufficient to make defendant company liable if such agents and employees had reason to know that such cattle were dangerous, and could have known it by the exercise of ordinary care and diligence.

"13. The burden of proof is upon the plaintiff and the cross-petitioners seeking to recover herein to establish their right to recover by a preponderance of the evidence.

"14. By a preponderance of the evidence does not necessarily mean by the greater number of the witnesses, but by it is meant that degree or condition of the proof which, when considered in the light of all the testimony in the case, seems to be the most reasonable, the most consistent, and the most satisfactory.

"15. You are the exclusive judges of the evidence, of its weight, and of the credibility of the witnesses, and in determining the credibility of the witnesses and in determining the credibility of a witness and the weight that you shall give his testimony you may properly take into consideration the interest of such witness, if any he may have, in the result of the action; his bias or prejudice, if any, for or against the party for or against whom such witness testifies; his powers of memory and of observation, his demeanor on the witness-stand, his intelligence, and the general reasonableness and consistency of his statements and any

other facts or circumstances disclosed by the evidence which in your judgment adds to or detracts from the credibility of such witness."

To which action of the court in giving each of said instructions (Tr. 266 to 269) the defendant company at the time duly excepted. (Tr. 270)

7. The Supreme Court erred in not reversing the judgments of the District Court for its failure to enter judgments for the defendant company on the special verdicts of the jury notwithstanding the general verdicts.

8. The Supreme Court erred in holding the defendant company liable under the Kansas statute to plaintiff and cross-petitioners for its act in bringing the Texas cattle into the State and in not holding that the Kansas statute was void as in conflict with the constitution and laws of the United States, viz.: the clauses of the constitution of the United States giving Congress power to regulate commerce among the several States and with the Indian tribes (Sub. 3, Sec. 8, Art. 1), and declaring the constitution and laws of the United States to be the supreme law of the land (Sec. 2, Art. 6) and the act of Congress approved May 29th, 1884, entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals (*supra*, pp. 2 to 6);" the act of Congress approved March 4th, 1891, making appropriations for the Department of Agriculture (*supra*, p. 7); the act of Congress regulating commerce approved February 4th, 1887, and amendatory acts known as the interstate commerce commission laws; the act of Congress approved June 15th, 1866, entitled "An act to facilitate com-

mercial, postal and military communication among the several States (*supra*, p. 7)."

9. The said Supreme Court erred in not holding that the defendant railroad company was authorized, justified and required to transport the Texas cattle in question from Texas to Kansas under the constitution and laws of the United States.

10. The said Supreme Court erred in not holding that the defendant company was and could in no way be held responsible for the act of transportation of the Texas cattle in question from Texas to Kansas and that its liability therefor, if any, could be only a liability arising under the laws of the United States.

11. The Supreme Court erred in refusing to reverse the judgments of said District Court for its refusal to admit in evidence the two permits of the Live Stock Sanitary Commission of Kansas signed by order of said commissioner, by Albert Dean, Inspector, who was also Live Stock Inspector for the Bureau of Animal Industry of the Department of Agriculture of the United States, the said permits being Exhibits I and J to the answer of the defendant railway company (Tr. 29), and being in words and figures as follows, to wit:—

35 EXHIBIT "I."

State of Kansas:

CATTLE INSPECTOR'S OFFICE,
KANSAS CITY, KANSAS, April 24th, 1892.

The Missouri, Kansas & Texas Railroad Company is hereby permitted to ship to Hartford, Kansas, 1,501 head of cattle, consigned to Hosier Brothers.

Said cattle are shown by affidavit in this office to

have been from Pecos County, Texas. These cattle are branded t $\overline{8}$ and other brands.

By order of Live Stock Sanitary Commission.

ALBERT DEAN, Inspector.

EXHIBIT "J."

State of Kansas:

CATTLE INSPECTOR'S OFFICE,
KANSAS CITY, KANSAS, June 3rd, 1892.

The Missouri, Kansas & Texas Railroad Company is hereby permitted to ship to Hartford, Kansas, 500 head of cattle, so consigned to Hosier Brothers.

Said cattle are shown by affidavit in this office to have been from Pecos County, Texas. These cattle are branded t $\overline{8}$ and other brands.

By order of Live Stock Sanitary Commission.

ALBERT DEAN, Inspector.

ARGUMENT.

I.

The Acceptance of the Cattle for Carriage by the Railroad Company and the Carriage of the same from Denison, Texas, to Hartford, Kansas, was an Act of Interstate Commerce.

Commerce is defined by this Court to mean trade or traffic, and when carried on between the States it is termed interstate commerce. Trade and traffic may be commerce locally, but to be interstate commerce there must be intercourse between the States, and the definition has been settled by the repeated decisions of this Court that interstate commerce is intercourse between the States. This may consist of transportation, or it may consist of communications; but interstate commerce embraces elements which are not embraced within the term commerce when applied to local trade or traffic. Interstate commerce may consist alone of communications sent from one State to another, or it may consist of transportation alone from one State to another. The transportation by one individual of his property from one State to another is interstate commerce, so that transportation is not only considered, and by some of the earlier decisions was termed an element of commerce, in the later decisions it is defined to be commerce itself.

In the case of Gibbons *v.* Ogden, 9th Wheaton, page 1, this Court had this question before it and in that case very fully defined the terms commerce and interstate commerce, and also the subjects embraced within those terms, or, perhaps more properly speaking, the elements constituting

the term interstate commerce. And when speaking with reference to paragraph 3, section 8 of article 1 of the constitution which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes, Chief Justice Marshall used the following language: —

> "The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects, to one of its significations. *Commerce, undoubtedly, is traffic, but it is something more; it is intercourse.* It describes the commercial intercourse between nations, and parts of nations, in all its branches, *and is regulated by prescribing rules for carrying on that intercourse.* The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.
>
> "If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the constitution

was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

"If the opinion that 'commerce,' as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

"It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted — that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

"The 9th section of the first article declares that 'no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another.' This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, 'nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another.' These words have a direct reference to navigation."

And also continuing on this same subject he said in the same case:—

"The word used in the constitution, then, compre-

hends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted, as if that term had been added to the word 'commerce.'

"To what commerce does this power extend? The constitution informs us, to commerce 'with foreign nations, and among the several States, and with the Indian tribes.'

"It has, we believe, been universally admitted *that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.*

"If this be the admitted meaning of the word, in its application to foreign nations, *it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.*

"The subject to which the power is next applied is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and it is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumera-

tion of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

"But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. *If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.*

"This principle is, if possible, still more clear, when applied to commerce 'among the several States.' They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. *What is commerce 'among' them; and how is it to be conducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be*

between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation, on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore."

Again, in the case of Welton *v.* The State of Missouri, 91 U. S. 275, Mr. Justice Field in defining the term commerce said: —

"*Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms including the transportation*, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, *and between the citizens of different States.* The power to regulate it embraces *all the instruments* by which such commerce may be conducted."

The case of Norfolk & Western Railway Company *v.* Commonwealth of Pennsylvania, 136 U. S., page 114, was one where the legislature attempted to impose a license tax upon all foreign corporations, except foreign insurance companies, and provided they should not have an office within the State until they had paid to the auditor-general the amount of such license tax, and providing a penalty for refusing to do so. The company defended upon the ground that it was engaged in interstate commerce and consequently was not liable for the

tax, and the question was whether the business of the company in the State of Pennsylvania was interstate commerce and, second, whether the tax was a tax upon its business. The court decided the first proposition in the affirmative, that its business within the State was interstate commerce, and the language of the court is as follows:—

> "The question before us is thus narrowed to the two following inquiries: (1) Was the business of this company in the State of Pennsylvania interstate commerce? (2) If so, was the tax assessed against it for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employees, a tax upon such business? We have no difficulty in answering the first of these inquiries in the affirmative. Although the findings of fact are somewhat meager on this question,— much more so, indeed, than the undisputed evidence in the case warranted,— enough is stated in the second paragraph of the aforesaid finding to show that the company is engaged in interstate commerce in the State. It is there said, in substance: By virtue of its connections and certain traffic contracts with other railroads, the Norfolk & Western Railroad Company 'has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this commonwealth.' That is to say, the business of the through line of railroad, of which the plaintiff in error forms a part, or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. It certainly requires no citation of authorities to demonstrate that such business — that is, the business of this through line of railroad — is interstate commerce. That being true, it logically follows that any one of the roads forming a part of, or constituting a link in, that through line, is engaged in interstate commerce, since the business of each one of those roads serves to increase the volume of business done by that through line."

We also desire this Court to consider the case of the Daniel Ball, decided by Mr. Justice Field and found in 10th Wallace, page 557. The Daniel Ball was engaged in the transportation of merchandise upon Grand river wholly within the State of Michigan, between the cities of Grand Rapids and Grand Haven. She was libeled for not paying a fee due the United States as a license fee under the act of July 7th, 1838, 5th Statutes at Large, 304, and the defense was made that being engaged in traffic upon Grand river wholly within the limits of the State of Michigan, she was not subject to the act of Congress; that only those vessels that crossed State border lines were subject to the license fee of Congress, but that the Daniel Ball was subject only to such regulations as the State of Michigan might impose. The contention was not sustained. Justice Field rendered the decision, and upon this question his language is as follows:—

> "But it is contended that the steamer, Daniel Ball, was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand river is a navigable water of the United States; and this brings us to the consideration of the second question presented.
>
> "There is, undoubtedly, an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated and, of course, that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. Gibbons *v.* Ogden, 9 Wheat. 194. In this case it is admitted that the steamer was engaged in shipping and transporting, down Grand river, goods destined and marked for other States than Michigan, and in receiving and trans-

porting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed *in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.* The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

To the same purport and effect are the following cases:—

Passenger Cases, 7 Howard, 283;
Brown *v.* Maryland, 12 Wheat. 419;
Wabash *v.* St. Louis & Pac. Ry. Co., 118 U. S. 557;
Fargo *v.* Michigan, 121 U. S. 230;
Bowman *v.* R. R. Co., 125 U. S. 465;
Mobile *v.* Kimball, 102 U. S. 691;
Coe *v.* Errol, 116 U. S. 517;
Leisey *v.* Hardin, 135 U. S. 100;
Bennett *v.* American Express Co., 83 Me. 236;
Hardy *v.* A. T. & S. F. R. R. Co., 32 Kan. 698;
Hall *v.* Decuir, 95 U. S. 485;
Gulf, Col. & Santa Fe *v.* Hefley, 158 U. S. 98;
Walling *v.* Michigan, 116 U. S. 466;

Robin *v.* Shelby Taxing Dist., 120 U. S. 489;
Brown *v.* Hanstan, 114 U. S. 622;
Grimes *v.* Eddy, 28 S. W. 756;
Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347.

From these cases it would seem that the law is now well settled that transportation of a commodity from one State to another is interstate commerce. Not only is that proposition settled, but the cases above cited go further and settle the question that even though the line of railroad or other means of transportation lies wholly within the limits of a State, and does not cross the border, yet if it forms a link or connection with some through line engaged in carrying goods from one State to another it is engaged in interstate commerce in so far as it receives commerce or a commodity from outside of the State into the State, or carries a commodity from inside of the State and delivers it to a carrier to be carried outside into another State. In other words, the above decisions settle the question that interstate commerce does not stop at the State line, but crosses into the interior, and is interstate commerce until it arrives at destination.

Not only do the above authorities define fully the term transportation, but in section I of the act to regulate commerce, approved February 4th, 1887, 24th Statutes at Large, 379, and as amended by the act of March 2d, 1889, 26th Statutes at Large, 743, the term "transportation" is defined to mean "all instrumentalities of shipment or carriage," so that whether the carriage be upon a boat on a navigable river, upon a canal or upon a railroad or other instrumentalities of shipment, transportation or carriage, it is none the less transportation and a subject of regulation by Congress provided it goes from one State into another.

Then the cattle shipment complained of in this case was purely an act of interstate commerce; it was an act o interstate commerce until the cattle were unloaded from

the cars at the destination thereof, to wit, the station of Hartford, Kansas.

The case of Bennett *v.* American Express Company, 83 Maine, 236, decided by the Supreme Court of Maine, was for the value of property which had been delivered to the American Express Company in the State of Maine for transportation to a point outside of the State. The transporting of the property out of the State was a violation of the police regulations of the State against killing and shipping game. The property was taken from the express company by the game warden in the State of Maine. The court held that the fact that the property was taken from the express company by the game warden was no defense; that he was a trespasser; that he had no right to take it; that as soon as the property was delivered to the express company it had begun to move as an article of interstate commerce and was subject only to the regulations of Congress, and was not subject to the police regulations of the State. We quote a part of the language of the court: —

> "This property was lawfully the property of the plaintiff. It was delivered to and accepted by the defendant company for transportation to a point beyond the limits of this State. Their liability as common carriers held them to a strict fulfillment of their obligation in relation to the property in their charge. That obligation was not merely to transport the property in this State, but to a point outside of its limits in another State. It had lawfully commenced to move as an article of commerce from one State to another. *From that moment it became the subject of interstate commerce, and, as such, was subject only to national regulation, and not to the police power of the State.* The same is unquestionably true in relation to whatever agency or instrumentality may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale, or exchange, under the commerce clause of the constitution of the United States.

The transportation of the subject of interstate commerce, where it is such as may lawfully be purchased, sold or exchanged, is without doubt a constituent of commerce itself, and is protected by and subject only to the regulation of Congress."

If the Texas cattle were articles of interstate commerce from the moment they were delivered to the carrier, as decided by the Supreme Court of Maine, they would continue to be articles of interstate commerce until they were delivered by the carrier at the destination, and, as such articles of interstate commerce, subject only to the regulations of Congress and not to the police power of the State of Kansas. From the moment they were delivered to the carrier at Midland, Texas, until they were unloaded from the cars of the carrier at Hartford, Kansas, and during that period of time, the whole power of the Federal government is pledged to protect and shield that property from State interference.

It is now settled, that any means by which interstate commerce is carried is interstate commerce itself. We call attention to the decision of Justice Miller on the Circuit in the case of the Clinton Bridge, 1st Woolworth, page 150, and quote a portion of his opinion, from pages 160, 161: —

"Another means of transportation, equal in importance to the steamboat, has also come into existence since the constitution was adopted. By it, merchandise is transported across States and kingdoms in the same vehicle in which it started. *The railroad now shares with the steamboat the monopoly of the carrying trade.* The one has, with great benefit, been subjected to the control of salutary congressional legislation. Is there any reason why the other should not be? However this question may be answered in regard to that commerce which is conducted wholly within the limits of a State, and which is therefore neither foreign commerce, nor commerce among the States, it seems to me

that when these roads become parts of the great highways of our Union, acting an important part in a commerce which embraces many States, and destined, as some of those roads are, to become the channels through which the nations of Europe and Asia shall interchange their commodities, there can be no reason to doubt that to regulate them is to regulate commerce both with foreign nations and among States, and that to refuse to do this is a refusal to discharge one of the most important duties of the Federal government. *As already intimated, the shackles with which the different States fettered commerce in their selfish efforts to benefit themselves at the expense of their confederates, was one of the main causes which led to the formation of our present constitution. The wonderful growth of that commerce since it has been placed exclusively under the control of the Federal government, has justified the wisdom of our fathers.*"

Interstate Transportation is Interstate Commerce and is Regulated Exclusively by Congress.

First, what is regulation? Referring again to the case of Gibbons *v.* Ogden, 9th Wheaton, Justice Marshall says: "*To regulate commerce is to prescribe the rule by which commerce is to be governed.*" Then, if it is the exclusive duty of Congress to regulate interstate commerce, we find that Congress alone possesses the power to prescribe the rules by which interstate commerce is to be governed. In 1866 Congress passed an act entitled "An act to facilitate commercial, postal and military communication among the States," fourteenth Statutes at Large, page 66, see Laws of Congress, *supra*, p. 7.

It seems that Congress by this act has assumed entire control and jurisdiction over every railroad in the United States and prescribed the necessary rules for the transportation of freight and passengers, as well as government

supplies, from one State to another, and, having acted, it is no longer a subject for State regulation or interference.

This act should also be considered in connection with the act subsequently passed on February 4th, 1887, as amended by the act of March 2nd, 1889, known as the interstate commerce law.

In Cooley *v.* Board of Wardens, *supra*, it is decided with reference to the exclusive power of Congress to regulate interstate commerce:—

> "Whatever subjects of this power are in their nature national or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

And in the acts of Congress referred to, Congress has legislated, and upon that subject such legislation is exclusive.

The Passenger cases, 7th Howard, 283;
Henderson *v.* Wickham, and
Commissioner of Emigration *v.* North German Lloyd, 92 U. S., page 259.

If Congress had not acted, then it would be a declaration that transportation of passengers and freight from one State to another should be free and untrammeled. In this connection, we call attention to a decision rendered by Chief Justice Field on the Circuit bench in case of Pacific Coast Steamship Co. *v.* Board of Railroad Com'rs, 18th Federal Reporter, page 10, from which we quote as follows:—

> "It was at one time a subject of much discussion and some disagreement among judges whether the

power conferred upon Congress to regulate commerce is exclusive in its character, or concurrent with that of the States. By recent decisions this question has been put at rest. *When the subject upon which Congress can act under this power is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, then the power is in its nature exclusive;* but when the subject upon which the power is to act is local in its operation, then the power of the State is so far concurrent that its action is permissible until Congress interferes and takes control of the subject. *Of the former class, is all that portion of commerce with foreign countries and among the States which consists in the carriage of persons and the transportation, purchase, sale, and exchange of commodities. From necessity, there can be but one rule in such cases for all the States; and the only power competent to prescribe a uniform rule is one which can act for the whole country. Its non-action in such cases is, therefore, equivalent to a declaration that such commerce shall be free from State interference.*"

See also opinion of Justice Field in the case of Mobile County *v.* Kimball, 102 U. S., page 691, as follows:—

"The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. *Of the former class may be mentioned all that portion of commerce with foreign countries or between the States, which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe.* Its non-action in such cases with respect to any particular commodity or mode of transportation is

a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. *There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States.* And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation."

Also in the case of Hall *v.* DeCuir, 95 U. S. 485, Chief Justice Waite said in speaking on this question of the control of interstate commerce, and the constant attempt of the States to infringe upon the exclusive domain of Congress:—

"*We think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress.* * * * If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. *Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without.* On one side of a river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments."

The same question was more recently passed upon in the case of Bowman *v.* C. & N. W. R. R. Co., 125 U. S., page 507, where the Court says: —

"But where the subject is national in its character,

and admits and requires uniformity of regulation, affecting alike all the States, *such as transportation between the States, including transportation of goods from one State to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.* Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the State shall be unrestricted."

In the case of Hardy *v.* A. T. & S. F. Ry. Co., 32 Kansas, 698, Chief Justice Horton, speaking for the Court, decides in perfect harmony with the decisions of this Court upon this question, and we quote from this opinion as follows:—

"From these authorities and the cases therein cited, we think it is conclusively settled that the portion of either interstate or foreign commerce which consists in transit or traffic, including *transportation in all forms, by land or by water*, and the purchase, sale or exchange of goods, is national, and susceptible of a uniform plan of regulation, and it is therefore under the exclusive control of Congress. Even if Congress had not seen fit to prescribe any specific rules to govern interstate commerce, that does not affect the question. *Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled.*"

THE POWER OF CONGRESS TO REGULATE MAY EXTEND TO THE MOST MINUTE DIRECTIONS. There seems to be no limitation to the power of Congress over this subject. It is given to Congress exclusively by paragraph 3 of section 8 of article 1 of the Constitution of the United States and we have already seen from the authorities above cited that it

does not stop at the boundary of States; that it extends into and over a State, and, as stated before, to the most minute directions. Judge Cooley in his work on Constitutional Limitations, 3d edition, at page 586, says:—

> "The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. *It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations, as well as the States; confining their operation to the subjects over which it is given control by the constitution.*"

The doctrine announced by Judge Cooley excludes the States from enacting any laws, whether in the nature of police regulations or otherwise, that infringe upon the domain of Congress with regard to interstate commerce. *That Congress has the power to establish quarantine regulations is as true and as well settled as any other power which Congress assumes to exercise, and with reference to all of the commodities that are transported from one State to another, it is within the legitimate exercise of the power of Congress to establish quarantine or police regulations affecting the same.*

Judge Story, in his great work on the Constitution, in speaking of the power of Congress and to what extent and for what objects and purposes the power to regulate com-

merce may be constitutionally applied, says in section 1075: —

> "And first among the States. It is not doubted, that it extends to the regulation of navigation, and to the coasting trade and fisheries, within, as well as without any State, wherever it is connected with the commerce or intercourse with any other State, or within foreign nations. * * * It extends to the regulation and government of seamen on board of American ships; and to conferring privileges upon ships built and owned in the United States in domestic, as well as foreign trade. *It extends to quarantine laws*, and pilotage laws, and wrecks of the sea. It extends as well to the navigation of vessels engaged in carrying passengers, and whether steam vessels or of any other description, as to the navigation of vessels engaged in traffic and general coasting business. It extends to the laying of embargoes, as well on domestic, as on foreign voyages. It extends to the construction of light-houses, the placing of buoys and beacons, the removal of obstructions to navigation in creeks, rivers, sounds and bays, and the establishment of securities to navigation against the inroads of the ocean. (It includes the power to declare by legislative enactment whether a certain bridge is or is not an obstruction to navigation.) It extends also to the designation of particular port or ports of entry and delivery for the purposes of foreign commerce. These powers have been actually exerted by the national government under a system of laws, many of which commenced with the early establishment of the constitution; and they have continued unquestioned unto our day, if not to the utmost range of their reach, at least to that of their ordinary application."

It necessarily follows that if a State police regulation in any manner interferes with or encroaches upon the ground covered by Congress in the exercise of its power to regulate interstate commerce, it must give way because the power of Congress is supreme and exclusive.

In one of the more recent cases, 8 Leisy *v.* Hardin, *supra*, this question is referred to by Justice Fuller as follows:—

> "The power vested in Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. *It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered.*"

The power, then, is complete and extends to every phase of the question, and is as extensive as the necessities may require. And should it become necessary to exercise police power over the subject of interstate commerce, it is just as much within the power of Congress to pass a law having the effect of a police regulation or a quarantine regulation as it is for Congress to pass any other law regulating the subject of interstate commerce; and while it may be said that the police power is vested in the States, yet where the subject is national in its character, and requires and admits of but one uniform system of regulation, then it is one over which Congress has the exclusive power; then the police power over that subject is vested in Congress as much as the power to regulate it in any other way. This is implied from the right given Congress exclusively to regulate commerce among the States. Justice Story in his work upon the Constitution, says in section 1292:—

> "While the principles of the constitution should be preserved with a most guarded caution, and a most sacred regard to the rights of the States, it is at once

the dictate of wisdom and enlightened patriotism to avoid that narrowness of interpretation, which would dry up all its vital powers, or compel the government (as was done under the confederation) to break down all constitutional barriers, and trust for its vindication to the people, upon the dangerous political maxim, that the safety of the people is the supreme law; a maxim which might be used to justify the appointment of a dictator, or any other usurpation."

Mr. Tiedeman, in his Limitations of Police Power, page 604, says:—

"The so-called 'strict constructionists' have maintained that the United States can exercise no power but what is *expressly* granted by the constitution. But this rule was at times applied so rigidly by the party in opposition, whenever it was desirable to prevent the enactment of an obnoxious law, that the right was denied to the United States to exercise even those powers which, although not expressly delegated, were so necessary to the effectuation of the express powers, that it cannot be supposed that the framers of the constitution did not intend to grant them. In numerous instances, the question of constitutional construction has been brought for settlement before the Supreme Court of the United States; and it is now firmly settled, that the Federal government can exercise, not only the powers which are expressly granted, but also those powers, the grant of which can be fairly implied from the necessity of assuming them, in order to give effect to the express grant of powers."

Again, Mr. Tiedeman in his work on the Limitations of Police Power, at page 614, after referring to paragraph 3 of section 8, article 1 of the constitution of the United States, says:—

"In conformity with this constitutional provision it has been held that whenever Congress exercises this

form of regulation over foreign and interstate commerce, State regulations must invariably give way, and the regulations by Congress of commerce may descend to the minutest details, providing regulations of the most local character in the exercise of this power."

From the above authorities it would seem to be fundamental that the power of Congress is exclusive over the subject of interstate commerce; that such power and its exclusiveness extends to the article as well as to the instrumentalities forming interstate commerce. In the case at bar it is live stock,— the transportation of live stock from one State to another,— and the power of Congress over it extends not only to all the regulations affecting the carriage of the live stock, but to the instrumentalities by which it was transported — the railroad; that there is no limitation to such power; that it extends to the most minute detail and can regulate or provide regulations of the most local character, and when Congress does act upon this subject, the State laws and regulations must give way as to all the ground covered by the regulations provided by Congress. We see by the above authorities that Congress can pass a uniform system of quarantine laws and provide all the regulations for carrying them into effect, and when Congress does establish a national system of quarantine, then all State laws, rules and regulations upon the question must give way to the exclusive authority and power of Congress over the subject.

II.

By the Passage of the Act of May 29th, 1884, entitled "An Act for the Establishment of a Bureau of Animal "Industry, to Prevent the Exportation of Diseased "Cattle, and to Provide Means for the Suppression and

"Extirpation of Pleuro-Pneumonia and Other Conta-"gious Diseases Among Domestic Animals," Congress provided a National System of Quarantine and also Delegated to the Department of Agriculture the Power to Establish all Proper Rules and Regulations for the Transportation of Domestic Animals.

It will be observed from reading the title to this act, that it is not made applicable to any particular State or to any particular Territory, but is national in its application, and the object of the act is to ascertain in what particular localities contagious diseases exist and to provide a national and uniform system of quarantine for the purpose of preventing the spread of such diseases (see *supra*, pp. 2–6, where act is printed).

By section 1 of the act, the Commissioner of Agriculture is authorized to organize in his department a bureau of animal industry, to appoint a chief thereof who shall be a competent veterinary surgeon, and whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious and communicable diseases among them and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country. The Commissioner of Agriculture has complied with this act. He has appointed a chief of the bureau of animal industry who has performed his duty as prescribed in the act and determined the causes of contagious, infectious and communicable diseases among domestic animals, and that he has determined the means for the prevention and cure of the same, and that he has faithfully collected such information on these subjects as will be valuable to the agricultural and commercial in-

terests of the country. But the power of the act does not stop there. By section 2 the Commissioner is authorized to appoint two competent agents who shall be practical stock raisers, or experienced business men, familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be under the instructions from the Commissioner of Agriculture to examine and report upon the best methods of treating, transporting and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous, infectious and communicable diseases. Under section 1 the expert veterinary surgeon is to investigate and determine the cause of contagious and infectious diseases among domestic animals. He is also to determine the means by which the spread of such diseases can be prevented. The agents referred to in section 2 are to examine and report upon the best methods of treating, transporting and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous, infectious and communicable diseases.

It is apparent that these agents and the veterinary, under the instructions of the Commissioner of Agriculture, are to act together; and that so far as sections 1 and 2 are concerned they are simply to determine the causes of diseases, the means of preventing the spread of the diseases, the best methods of treating, transporting and caring for animals, and to provide against the spread of other contagious, infectious and communicable diseases. When all this information is laid before the commissioner, it is then made his duty by section 3 of the act to provide such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive

authority of each State and Territory, and invite said authorities to co-operate in the execution and enforcement of the act.

From this it is practically clear that the rules and regulations prepared by the Commissioner of Agriculture and served upon the executive of the States or Territories becomes a part of the act or a part of the law, and that his suggestions, consisting of the rules and regulations for the suppression of contagious diseases, are just as effective as though passed by an act of Congress; because full authority is given, under these three sections of the act, for the commissioner to adopt any rules or regulations which he may deem necessary for the purposes of preventing the spread of contagious diseases among domestic animals. Sections 4 and 5 of the act provide for certain duties to be performed by the Commissioner of Agriculture relating to the exportation from the United States to any foreign country of any live stock affected with any contagious, infectious or communicable diseases, and especially the disease known as pleuro-pneumonia.

Section 6 of the act in terms forbids the transportation of diseased animals. It prohibits the railroad companies from transporting diseased animals. And it will probably be claimed by the other side that under the terms of Sec. 6, it makes no difference whether the railroad company was advised of the facts as to the capability of the animals transported by it to communicate diseases; that if such fact could be ascertained by the company in any manner, it is the company's duty to do so, and that it is no defense that the company was ignorant of the dangerous character of the cattle. By reading Section 6, it will be noticed that the owner of the cattle is forbidden to knowingly deliver to the railroad companies any cattle capable of communicating a contagious disease. Section 6 must be construed together with all the other sections of the act,

keeping in view the object to be obtained by the enforcement thereof.

It must be admitted that this section shall receive such construction as was intended by Congress; but it is improbable that Congress intended to only make the owner of the cattle — the man who is best acquainted with their condition as to health or otherwise — liable when he knowingly delivers cattle to a railroad company for carriage that are capable of communicating a disease, and make the carrier liable for carrying them whether it knew the fact or not. Such a construction of Section 6 would be unreasonable, and if it is to prevail then we say that the entire law upon the subject of carriers must be changed and the carrier must have the right to refuse shipments of cattle regardless of the fact whether they are diseased or not, or that the carrier shall be permitted to refuse except upon a guarantee of protection, so that we say the construction of this section contended for by the court below and by the other side in this case, is not reasonable, was not intended by Congress and is not in harmony with the other provisions of the act. We might admit, for the purposes of argument, that the railroad company would be liable under this section if it knowingly accepted cattle capable of communicating a contagious disease and knowingly transported them and negligently permitted them to communicate the disease to other stock while in its possession or under its control though the statute imposes no civil liability in any express terms. But a most conclusive answer to the contention of the other side is that whatever construction may be given to section 6 with reference to this matter, we have not been sued for a violation of section 6, but have been sued only for a violation of the State law. If claimants were to derive any benefit from the terms of this section they should have based their action upon it, and not having done so it is not a question material in this case

how section 6 shall be construed. It is common law that before a corporation can be held for damages under such circumstances it must be shown that it knowingly transported the diseased animals and that the disease was communicated while in their control. The power given Congress to regulate this subject gives it the power to declare a penalty and all necessary penalties for an infraction of either the law or the rules promulgated by the Department of Agriculture; and nowhere in the act and nowhere in the rules promulgated by the Secretary of the Department of Agriculture can the carrier be made liable either civilly or criminally except as knowingly violating either the laws or the rules of the Secretary; and such violation could only occur where it had knowingly transported diseased cattle or knowingly transported cattle capable of communicating disease which had communicated the disease which the carrier had or ought to have had restraining power over them.

In order that the carriers may be informed as to the localities in which the disease exists and thereby avoid incurring any liability under the act of Congress, the commissioner is authorized by section 7, to notify, in writing, the officials or agents of railroad, steamboat or other transportation companies doing business in or through any infected locality; also public notice thereof by publication in such newspapers as he may select of the existence of said contagion. Evidently his information is the result of the compliance by the veterinary surgeon and the two assistants provided by sections one and two of the act. From the information gathered by these parties he is enabled to notify the railroad companies and to give public notice of the localities where any diseases exist. The receiving for transportation of cattle from inside of the infected area as established by the notice which he serves upon the railroad companies and by his public notice, might be taken as prohibited by the act

but when the cattle are from outside of the infected area there is no prohibition, and absolutely nothing to warn the carrier of the dangerous character of the cattle. He has the right to rely upon the result obtained by the experience of the Bureau of Animal Industry, and to rely absolutely upon the information given by the notice served upon him of the localities in which the disease exists, and the carrier is not bound to look elsewhere for the existence of that disease. By the above act Congress has taken charge of the entire question and assumed the responsibility. The act and rules and regulations of the Department of Agriculture must be construed together, and they must be construed as an intimation on the part of Congress to absolutely control this question and relieve States from any responsibility therefor. It is both a quarantine and a police regulation, and is enacted with a view of protecting interstate commerce from State interference upon the pretext that the State is exercising quarantine and police power. We call the court's attention to an editorial which appeared in the Central Law Journal of June 12, 1885, upon this question. The article was suggested by the fact that the Governor of Illinois, upon information officially reported to him by the State veterinary surgeon of that State that Texas fever existed in Missouri, issued his proclamation prohibiting all railroad and transportation companies from bringing cattle from the State of Missouri into the State of Illinois unless before shipping the same from the State of Missouri, they shall receive from duly recognized veterinary authority of that State a certificate showing that the cattle shipped or transported are in a healthy condition and have not been exposed to such disease for a period of one hundred (100) days next preceding the removal of such cattle from such State. This action on the part of the Governor of Illinois was resented by the Governor of Missouri, and the Gov-

ernor of Illinois was urged to rescind his action, which, however, he refused to do. The Central Law Journal, after setting out the above facts and commenting upon them, makes this suggestion: —

> "This circumstance is fruitful of suggestions. Many States have laws under which their authorities may establish quarantine regulations against other States, both in respect of persons and animals. The establishing of such regulations may be the result of fear superinduced by false or erroneous reports, and intensified by local jealousy. They may be wholly unnecessary. In nearly every case they are believed to be ineffectual. But they have the effect of greatly impeding commerce and of injuring, not only the citizens of the State against which they are directed, but also the citizens of other States. The lesson which this teaches is, that the subject of interstate commerce has become altogether too large a subject to be dealt with by the States. The same may be said of regulations designed to prevent the spread of contagious diseases, whether among men or animals. The whole subject ought to be committed to the exclusive control of the department of the interior, with ample powers, and with ample means for the execution of such powers."

In the above article the editor of the journal makes an excellent suggestion, but seems to have overlooked the fact that only shortly prior to the publication of his editorial, Congress had done just what he herein suggested by passing the act of May 29th, 1884; but the act had not yet become operative all over the United States, because of the fact that it took time to make the necessary experiments and provide the rules and regulations necessary under the act.

That Congress intended the act of May 29th, 1884, to cover every feature of the transportation of live stock, diseased and healthy, cannot be doubted for a moment. It

was intended as an authority for proper quarantine rules and regulations; it was intended as authority for proper police regulations to take entire control of the subject and ascertain not only the place where these diseases exist, but to quarantine such localities, and to prescribe proper rules for the transportation of any and all live stock from one section of country to another, with proper and appropriate penalties for an infraction and violation thereof.

Mr. Prentice, in his recent work on Police Power, says on page 13:—

> "The United States has extended its police legislation in a number of instances, as in the law against trusts and monopolies entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' and in the acts in regard to lotteries, refusing the facilities of the mails to the distribution of circulars and advertisements deemed injurious to the public morals. *In interstate commerce the government exercises this inherent power for protection through the Department of Agriculture and the Bureau of Animal Industry. Agents and methods are employed to examine, quarantine and destroy the animals and to extirpate pleuro-pneumonia. In such efforts the aid of the States and Territories is invited, but the general government proceeds to original action.* Further acts regulate the safe and humane treatment of animals in transportation."

The bitter experience of the Western States has taught the public that the only way in which this matter could be controlled was, as is stated before, by one full, complete and comprehensive system of national quarantine, regulating the shipment and transportation of domestic animals, and providing for the investigation, suppression and extirpation of all contagious, infectious and communicable diseases among them.

It was contended below that the act of the legislature of Kansas, approved March 26th, 1884 (see Sec. 6826, *supra*, p. 15), was passed before the passage of the law of May 29th, 1884. It is true that it was approved prior to the passage of the act of May 29th, 1884, but at the time the act of the Kansas legislature, approved March 26th, 1884, was passed the law creating the Bureau of Animal Industry had already passed Congress and was then pending in the Senate, and that there was very little doubt that it would pass. The history of the act of May 29th, 1884, is as follows: —

House Bill No. 3967, which ultimately became the law in question, was introduced by Mr. Hatch of Missouri, on January 26th, 1884, as a substitute for House Bill No. 876, which had been previously introduced (see Congressional Record, 48th Cong., 1st Session, part 1, page 682). While this bill was pending before Congress, there was presented and read in Congress a resolution of the Kansas State Board of Agriculture, held in Topeka, Kansas, January 10th, 1884, which resolution reads as follows:

> "Resolved, That our members in Congress be, and they are hereby respectfully *requested to favor such legislation as may be necessary to determine and clearly define the Territory of the United States now infected with the disease among cattle known as pleuro-pneumonia*, and to circumscribe, to strike out, this much dreaded disease in this country by the purchase if necessary, at the expense of the Government, and slaughter of all animals infected with the disease, or known to have been exposed thereto."

(See Congressional Record, 48 Cong., 1st Ses., part 1, page 900.)

The bill passed the House of Representatives, February

28th, 1884 (see Congressional Record, 48 Congress, 1st Ses., part 2, page 1465), and passed the Senate April 29, 1884 (see page 3585), and was approved by the President May 29th following.

This warrants us in saying that the act of the Kansas legislature, passed March 26, 1884, was in view of the probable passage by Congress of the act of May 29, 1884.

The stock interests all over the country were watching the progress of this bill in Congress, because in Congress alone was there any hope of effectually suppressing contagious diseases among domestic animals in the United States. Until Congress assumed jurisdiction of this question it was not known where the disease existed. States were quarreling among themselves — accusing each other, and by passing quarantine laws and regulations seriously embarrassing and injuring the material and business interests of each other. And it never became known to what particular district or what particular territory the disease of Texas, splenic, or Spanish fever was confined until the experiments of the chief of the Bureau of Animal Industry, conducted under the authority of the act of May 29, 1884, resulted in disclosing in a satisfactory manner that information to the public, and relieved the States of the embarrassment to which timidity, apprehensions, jealousies, etc., had driven them.

The Laws of Kansas for the Protection of Domestic Animals are in Effect a Regulation of Interstate Commerce and Conflict with the Act of Congress and the Rules and Regulations of the Department of Agriculture Promulgated Thereunder.

Section 6775, *supra*, pp. 13 & 14, declares that the fact hat the cattle came from south of the thirty-seventh parallel

of north latitude (which is the south line of Kansas) shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offense was committed, capable of communicating and liable to impart Texas splenic or Spanish fever.

Section 6775 also provides for the punishment of the party who shall bring the cattle in, and also provides that in any action, whether it be a criminal action or a civil action to recover damages, proof that the cattle were brought into this State from south of the thirty-seventh parallel of north latitude (south line of Kansas) shall be taken as *prima facie* evidence that such cattle were capable of communicating and liable to impart Texas splenic or Spanish fever within the meaning of the act; but the court will observe that the words "ship or transport" are not used in this section, and consequently it is a strained construction to make its terms cover the act of the railroad company in bringing the cattle into the State.

The section of the Kansas statute under which the courts below held the defendant liable is section 6774, *supra*, pp. 13. It provides "that any person or persons who shall drive, ship or transport," or cause to be "shipped or transported" into or through any county, Texas cattle, shall be liable for damages sustained by communication of the Texas fever. Particular attention is called to the words "ship or transport," for the reason that nowhere in the statute is the carrier of live stock mentioned, unless it can be held that the words "ship or transport" include the carrier as well as the owner. The statute apparently upon its face is directed against the owner of the cattle, or his immediate agents who have the cattle in charge; and nowhere in the statute is there any pretense that there is any attempt to prohibit or connect the carrier with the unlawful handling

of the cattle, unless the words "ship or transport" can be so interpreted as to include the carrier. This interpretation, manifestly erroneous, has received the sanction of the Supreme Court of Kansas in this case.

Section 6760, *supra*, pp. 10. Simply prohibits the driving into any county or part thereof in this State, or upon the highway, range, common or pasture within this State, any cattle capable of communicating or liable to impart the disease known as Texas splenic or Spanish fever. Section 6775 by its terms provides that upon the trial of any person charged with the violation of any of the provisions of this law, and in the trial of any civil action brought to recover damages for the communication of Texas splenic or Spanish fever, the fact that the cattle which communicated said disease were brought into the State from south of the thirty-seventh parallel of north latitude (south line of Kansas) shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offense was committed, capable of communicating and liable to impart the said disease within the meaning of this act, and that the owner or owners, or person in charge of such cattle, had full knowledge or notice thereof. By the opinion handed down in this case, this statute is construed to mean that the carrier had knowledge and notice of the dangerous character of the cattle because they came from south of the south line of the State of Kansas.

Both sections 6774 and 6775 above quoted undoubtedly, as construed by the opinion of the Supreme Court of Kansas in this case, are intended to operate as a restraint upon the shipment of cattle from south of the south line of Kansas, not upon the owner alone, but also upon the carrier as well, and are therefore an attempt on the part of the State to regulate, to interfere with, and restrain interstate shipments of cattle. In fact the operation of both sections 6774 and

6775, as construed by the Kansas Supreme Court in this case, is confined entirely to shipments from south of the south line of Kansas between the first day of February and the first day of December during any year, and that too, regardless of any Federal laws, rules or regulations upon the subject. In fact, in the opinion in this case, in which the above sections of the Kansas statute are construed (erroneously as we claim), the authority of Congress and of the Secretary of the Department of Agriculture under the act of Congress creating the department, to make any regulations which would have the effect to abrogate in any degree the statute of this State, is denied. See transcript, 295, where the SupremeCourt says:—

> "They (referring to the railroad company) brought the infected cattle into the State, to the station of Hartford, fully cognizant of the purpose of Hosier Brothers and Brogans, and did knowingly aid them in carrying out that purpose. They are responsible for all the direct consequences that have ensued therefrom. They acted not only in direct violation of the statutes, which have been found by long and bitter experience to be so essential to the protection of the domestic cattle of the State, but they acted in direct violation of Section 6 of the act of Congress before quoted. *The regulations established by the Secretary of Agriculture contain nothing tending to exempt the company from liability, and the Secretary had no power under the act of Congress to make any regulations which would have the effect to abrogate in any degree the statutes of this State.*"

It is not contended that the rules established by the Secretary of the Department of Agriculture contain anything in express terms exempting the railroad company from liability for an act of negligence, but it is contended that the Secretary of the Department of Agriculture has the power under the act creating

the Bureau of Animal Industry to establish all rules and regulations for the transportation of Texas cattle between the States, and that the railroad company as a carrier of domestic animals has a right to rely upon the rules and regulations of the Department of Agriculture, and if it complies with such rules and regulations, it is exempt from all liability for the act of bringing the cattle into the State, nor can any burden be imposed upon it for its agency in bringing the cattle into the State. Nor can it be charged with violating any State law upon the subject, for the reason that any State law to be valid must be in absolute harmony not only with the act creating the Bureau of Animal Industry, but with all rules and regulations promulgated by the Secretary of the Department of Agriculture thereunder; and any State law that in terms or by implication conflicts with either said act or said rules and regulations must give way and yield to the superior power of Congress.

Sections 6774 and 6775 are different in their terms and conflict with the rules and regulations established by the Secretary of the Department of Agriculture. Under the rules and regulations established by the Secretary of the Department of Agriculture, he is required under section 7, *supra*, p. 5, to serve notice upon the management of railroad companies who do business through an infected district, of the existence of this contagious, infectious or communicable disease, and then any railroad company that shall take any cattle from inside of that territory described in the Secretary's notice, which shall be capable of communicating this disease, shall be liable, etc. The terms of section 7, which are ignored by the Supreme Court of Kansas, are that the railroad company can only be made liable when its officers knew of the dangerous character of the cattle, and knowingly violate section 6. Section 7 is ignored by the Supreme Court and section 6 is wrongfully construed to mean that the carrier takes these cattle at its peril, and

is erroneously construed to be in harmony with the statutes of the State of Kansas which forbid the bringing in of cattle from south of the south line of the State between February 1st and December 1st of each year.

We find upon comparing the circular of 1892 issued by the Honorable Jeremiah M. Rusk, Secretary of the Department of Agriculture (which was the year these cattle were brought into the State of Kansas), with the Kansas statutes, that there is a material difference; that under the terms of the circular with the accompanying map the area in the United States in which there are infected cattle, or cattle capable of communicating infectious, contagious or communicable diseases, is different from that prescribed by the Kansas statute. The Texas cattle in question came from north and west of the government quarantine line and were, under the rules and regulations of the Department of Agriculture, from a locality where cattle were supposed to be healthy and incapable of communicating the disease known as Texas splenic or Spanish fever, and had the right to remove by rail to Kansas. Yet they were prohibited by the Kansas statutes from entering the State of Kansas between the first day of February and the first day of December of each year, and because they were from south of the south line of Kansas was made *prima facie* evidence of the fact that they were capable of communicating this disease, notwithstanding the experiments of the Department of Agriculture had demonstrated the contrary.

Congress undertook, by virtue of the act of May 29th, 1884, to provide a general system of quarantine and regulations for the purpose of the suppression and extirpation of contagious diseases among domestic animals, and it confided the details of that system entirely to the Secretary of the Department of Agriculture. This it could legally do, as was decided in the case of Morgan *v.* Louisiana, 117 U. S. 455, wherein the court said: —

"It may be conceded that whenever Congress shall "undertake to provide for the commercial cities of "the United States a general system of quarantine, or "shall confide the execution of the details of such a "system to a national board of health, or to local "boards as may be found expedient, all State laws on "the subject will be abrogated, at least so far as they "are inconsistent."

In the light of this opinion, all State laws of Kansas in conflict with the act creating the Bureau of Animal Industry, or in conflict with the rules and regulations established and promulgated by the Secretary of the Department of Agriculture thereunder, are abrogated in so far as they are inconsistent. If the Secretary says that the disease exists within a locality and draws his imaginary line around that locality, it is not within the power of any State legislature or any quarantine board, or any State Supreme Court, or the executive of any State, to say that it exists elsewhere and to prescribe additional rules and regulations than those prescribed by the secretary of the Department of Agriculture. The effect of the secretary's rules is to say that outside of, or in this case north and west of the quarantine line established by him, the shipment and transportation of all domestic animals shall be free and untrammeled, and it is not within the power of the State legislature, nor is it within the power of a quarantine board, or any Supreme Court or the executive of any State, to impose a burden either directly or indirectly upon the transportation of domestic animals between the States under the secretary's rules and regulations that transportation of the same shall be free and untrammeled. Congress, through the secretary of the Department of Agriculture, says that the transportation of domestic animals from north and west of its quarantine line shall be free and untrammeled; the Supreme Court of Kansas says that the legislature

of the State can extend that line and include territory therein and impose restrictions upon the transportation of animals not imposed by the act of Congress of May 29th, 1884, or the rules and regulations of the Department of Agriculture promulgated thereunder. Is this leaving the transportation of domestic animals from points north and west of the government quarantine line free and untrammeled? Is the declaration of Congress made through the Secretary of the Department of Agriculture that said traffic shall be free and untrammeled, to be lightly ignored, abrogated and trampled under foot by the legislature or Supreme Court of the State?

Not only is the Kansas law construed by the court in conflict with the act of May 29th, 1884, and the rules and regulations prescribed thereunder, but the decision of the Supreme Court goes even farther than it is warranted by the statute in going. By the terms of the decision, the power of the secretary under the act of Congress is absolutely denied, and the proposition is advanced that any law of Congress attempting to regulate interstate commerce which shall conflict with the laws of Kansas enacted under its police power, that such law of Congress and the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder, must give way.

And the Supreme Court of Kansas continues and says:—

> "The conclusions we have reached render it unnecessary to consider how far Congress by acts passed for the regulation of interstate commerce could go in curtailing the power of the legislature of this State to protect its citizens from the introduction of infectious and contagious diseases dangerous to their life or destructive to their property."

In the above conclusion the Court overlooked the fact

that the question is not how far the Congress can go but how far can the State go in restricting interstate commerce or imposing a burden thereon where Congress says it shall be free and untrammeled. The above declaration assumes the right in the Supreme Court of Kansas to determine just how far Congress may go in the exercise of its power to regulate interstate commerce.

It would seem to be well settled from the authorities which we have cited that the power of Congress over the question of interstate commerce and, as transportation from one State to another is interstate commerce, the power of Congress over transportation is unlimited; just so long as Congress does not attempt to interfere with the regulation of the domestic affairs of the State, its power cannot be questioned. But the statute of Kansas, as construed by the Supreme Court in this State, goes farther than the mere regulation of the domestic affairs of the State; it is a prohibition upon the carrier against the bringing in of this class of cattle, not cattle that are known to be diseased but all cattle from south of the south line of the State, because it says that cattle from south of the south line of Kansas are capable of communicating this disease, and the fact that they are from south of the south line of Kansas shall not only be *prima facie* evidence of the fact that they are capable of communicating the disease, but shall be *prima facie* evidence of the fact that the carrier had notice of the dangerous character of the cattle. The decision of the Supreme Court of Kansas in upholding the State statute and striking down the Federal law, and denying the authority of the general government, through its Department of Agriculture to make any regulations which would have the effect to abrogate in any degree the statutes of this State, carries the doctrine of State's rights to a degree hitherto unknown to the jurisprudence of this country. It would seem from the amount of blood and

treasure spent some thirty years ago in the settlement of this question that it ought not again to be heard or to receive sanction and support, at least from the Supreme Court of Kansas.

Again, the Supreme Court of Kansas overlooked the important and controlling fact that Congress by the passage of the Act of May 29th, 1884, and the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder, curtailed interstate commerce as far as the investigation by the Secretary of the Department of Agriculture made through his Chief of the Bureau of Animal Industry thought it necessary to do so for the safety of domestic animals in the State of Kansas and elsewhere north and west of the quarantine line, and that its action with reference to this question and every phase of it has been most thorough and complete, leaving absolutely nothing for the States to do but to co-operate in the enforcement of the provisions of that act and the rules and regulations of the Secretary of the Department of Agriculture promulgated thereunder.

If the Supreme Court of Kansas means that its law is a police regulation, the opinion goes too far. Conceding the law of Kansas in regard to this matter to be a police regulation, it goes farther than a mere regulation; if it was a police regulation regulating simply the internal affairs of the State, then it would not operate upon interstate commerce, because this was interstate commerce until the cattle were unloaded from the cars and mingled with the property of the State. They were not subject to the jurisdiction of the State authority while being transported; they were then protected by the interstate commerce laws and were subject to no authority except that of the general government. This question has been settled by the repeated decisions of this Court. In this connection we call this Court's attention to the case of

Bowman *v.* C. & N. W. R. R. Co., 125 U. S. page 507,

where the Court speaks with reference to the police regulations of a State, and when a police regulation of a State takes effect and operates upon property coming into the State as the subject of interstate commerce. The Texas cattle in question were as much interstate commerce as was the property which in that case it was sought to compel the Chicago & North Western Railroad to carry. The company had refused to carry this property consisting of some four thousand barrels of beer, because it was prohibited by the laws of Iowa from carrying the property into the State; but this Court held that the fact that the law of Iowa prohibited the railroad company from carrying the property into the State was no defense to an action against the company for its refusal to receive the property, and that it was bound to receive and carry the property. The Court then said:—

> "*It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled.*"

Again, in Welton *v.* The State of Missouri, 91 U. S. 275, where the Court speaking with reference to the extent of the power of Congress and when it ceased to protect the property imported from one State into another, and also when the police regulations of the State operated upon the property, said:—

> "The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or inter-

fering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, *and to no greater burdens*. If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by State legislation, the object of investing the control in Congress may be entirely defeated."

And again, further on in the opinion, speaking upon the same subject, the court said:—

> "It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. *That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin.*"

Again in the case of Henderson *v.* Mayor of New York City, 92 U. S. 259, the court speaking with reference to this same subject says:—

> "But, however difficult this may be, *it is clear, from the nature of our complex form of government, that, whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States.*"

And also in the case of Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 176, the court, speaking with reference to this same power, the extent of it, and the subjects upon which it acts, says when the subject upon which it acts are "national in their character and require uniformity of "regulation, affecting alike all the States, the power of "Congress is exclusive," and when Congress fails to act

"*its non-action is a declaration that it* (*commerce*), *shall* "*remain free from burdens imposed by State legislation.*"

Applying this law to the case at bar, the police power of the State did not operate upon these cattle until after they had been unloaded from the cars at Hartford, Kansas, and had mingled with the property of the State.

In Illinois there is a law against bringing into the State any Texas or Cherokee cattle except between the first days of October and the first days of March following of each year. A second section of the act provided that it should be unlawful for any person or persons or railroad company, or other corporation or association of persons within the State, to own, or have in possession or control, any Texas or Cherokee cattle at any time, which may have been brought into the State at any time between the first days of October and the first days of March following of each year. In the case of Salzenstein *v.* Maris, 91 Ill., this law was before the court and it was held invalid. The language of the court in passing upon the validity of the law is as follows: —

> "We cannot, however, understand how the right to transport and bring into this State Texas cattle can be exercised, if the owning or possessing such cattle within the State is prohibited. The right to transport from another State into this State necessarily includes the right of possession and ownership in this State. If the latter is prohibited, the former right must fall with it. If the legislature has the constitutional right to declare that a person shall possess or own a certain kind of property within the State, which may be raised or produced in another State of the Union it logically follows that all interstate commerce in such property is both regulated by the legislature and is prohibited. We do not understand that the legislature can do indirectly that which the constitution of the United States prohibits to be done directly. Such,

however, would be the case if the theory of the plaintiff in this case was sanctioned."

The Illinois statute and the Kansas statute are substantially the same. The Illinois statute prohibited the bringing into the State of any Texas or Cherokee cattle between the first day of March and the first day of October of any year; the Kansas statute prohibits the bringing in of any cattle from south of the south line of Kansas between the first day of February and the first day of December of each year. If anything, the Kansas statute is more sweeping in its terms and more strictly prohibitive in its terms, because it reaches all classes and grades of cattle, while the Illinois statute in its operation was limited only to two classes,— Texas and Cherokee. There is substantially no difference so far as the right of the State to interfere with the transportation of cattle into the State is concerned.

It might be perfectly competent for the State to pass a proper inspection law, and we will show further on that the State has a law of that kind. It might have been perfectly competent for the State to have said to the carrier, "we desire to inspect these cattle," and if the authorities of the State deemed the cattle dangerous to other domestic animals in the State, it would have been perfectly competent for the authorities to have taken possession of the cattle at destination, to have placed them in quarantine and to have kept them there until all danger of contagion was passed. But although the State had inspectors stationed, one at Fort Worth and one at Parsons, the cattle in question passing right under the eye of these two inspectors, they seemingly did not deem the cattle dangerous; at least, they did not advise the State authorities of such fact. Is the railroad company to be held to the exercise of greater care? Is the railroad company to become a part of the police force of the State? Is the railroad company to be compelled at its

own expense, in order to avoid liability under a State law, to inspect these cattle, and that too after they had passed the State inspectors without objection, and that too when under the Federal rules and regulations no inspection is necessary? Where is the law making railroads a part of the police force of the State and making them liable for a failure to properly discharge their duties as such?

We submit that such a requirement would be adding a burden and a very heavy burden upon interstate transportation. In fact, if the doctrine announced in this case by the State court is to be sustained, there is not a railroad company running from south to north but what would have to employ its own veterinary surgeon for the purpose of investigating and ascertaining if each car load of cattle tendered it for shipment was incapable of communicating Texas splenic or Spanish fever, and its failure to do so would result in its becoming liable in case such cattle should communicate the disease. Such a requirement is an unreasonable burden upon the carrier and yet in the oral argument of this case, both in the trial court and in the Supreme Court of the State it was insisted that this was just what the railroad company should do. There is no law existing either at common law or by statutory enactment, imposing this amount of care upon carriers; and it is not within the power of a State to impose upon the carrier of interstate commerce this requirement.

Mr. Tiedeman, in his Limitations of Police Power, page 615, says:—

> "*If the business in question contains an element of danger to the public, it may be subjected to regulations designed to protect the public against injury; it may be made subject to inspection, and a license fee may be exacted in aid of its inspection laws. This is an ordinary police regulation.*"

The Kansas law is not a police regulation; it is not an inspection law; it goes further than that and covers identically the same ground covered by the act of Congress creating the Bureau of Animal Industry and the rules and regulations of the Department of Agriculture thereunder. In Missouri there was a statute which provided that "no "Texas, Mexican or Indian cattle shall be driven or other- "wise conveyed into or remain in any county in this State "between the first day of March and the first day of "November, in each year, by any person or persons what- "soever." There was another and later section of the statute which provided as follows:—

> "If any person or persons shall bring into this State any Texas, Mexican or Indian cattle in violation of the first section of this act, he or they shall be liable in all cases for all damages sustained on account of disease communicated by said cattle."

Under this law, an action for damages was brought against the Hannibal and St. Joseph R. R. Co., for bringing into the State cattle in violation of this law. The statute was held, in R. R. Co. *v.* Husen, 95 U. S. 465, to be in violation of the commerce clause of the constitution, and, in passing upon this question, this court said:—

> "It seems hardly necessary to argue at length, that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress. It is plain regulation of interstate commerce; a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution of the United States, to Congress, in the same words in which it is given over the other, and in both cases it is neces-

sarily exclusive. That the transportation of property from one State to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.

"The Missouri statute is a plain interference with such transportation; an attempted exercise over it of the highest possible power — that of destruction. It meets at the borders of the State a large and common subject of commerce, and prohibits its crossing the State line during two-thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the State without being unloaded. *But even the right of steamboat owners and railroad companies to transport sach property through the State is loaded by the law with onerous liabilities because of their agency in the transportation.* The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States. This court has heretofore said that interstate transportation of passengers is beyond the reach of a State legislature."

The statute of Missouri does not differ from the effect of the decision of the Supreme Court of Kansas in this case, except that the law of Kansas prohibits the bringing in of cattle capable of communicating Texas fever, and the law of Missouri prohibited the bringing in of Texas, Mexican or Indian cattle. In the case just cited, the cattle were of the class prohibited and were diseased cattle. Under the Kansas law in the case at bar, the cattle were only prohibited in case they were diseased; but the fact that they were from south of the south line of Kansas was taken as evidence of the fact that they were diseased. Therefore, the laws are exactly alike, because the law of Kansas makes the fact that they are from south of the south line of Kansas *prima facie* evidence of the fact that they are capable of communicating a disease, while the law of

Missouri assumed that the fact that they were Texas, Mexican or Indian cattle was evidence of the fact that they were capable of communicating a disease. One law makes the direction from which the cattle come into the State *prima facie* evidence of the fact that they are capable of communicating disease, while the other law assumed that the nativity of the cattle was evidence of the fact that they were capable of communicating disease. If anything, the Kansas law is more objectionable than was the law of Missouri.

The doctrine announced in the Husen case has been since followed by the Supreme Court of Missouri in the case of:—

Gilmore *v.* Hannibal & St. Joe R. R. Co., 67 Mo. 323.

And by other State courts:—

Adams Express Co. *v.* Board of Police, 65 Howard's Practice, 72;
Chicago & Alton R. R. Co. *v.* Ericson, 91 Ill. 613;
Salzenstein *v.* Maris, 91 Ill. 391.

As we have said before, Congress has exclusive control of this question and had a right to prescribe every rule and regulation affecting this shipment of cattle from the time they were loaded at Midland, Texas, until the time they were unloaded at Hartford, Kansas, and no State law or requirement could, under the circumstances of this case, operate upon these cattle or burden the railroad company for carrying these cattle in any manner whatever; and all State laws, whether civil or criminal, whether police regulations or otherwise, must go down before the law enacted by Congress on May 29th, 1884, and the rules and regulations of the Department of Agriculture promulgated thereunder. It may be repeating and citing cumulative author-

ities upon the question, but we call this Court's attention to the decision of

Sherlock *v.* Alling, 93 U. S., page 99,

and to quote from a portion of the decision in that case: —

> "*It is true that the commercial power conferred by the constitution is one without limitation.* It authorizes legislation with respect to all subjects of foreign and *interstate commerce, the persons engaged in it, and the instruments by which it is carried on.* And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.
>
> "*The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority.*"

This doctrine has been upheld by the Supreme Court of Texas in case of Missouri, Kansas & Texas Railway Co. *v.* Fookes, 40 S. W. Reporter, page 858. In that case, the validity of article 4560 Rev. Statute 1895 was before the court for interpretation, the validity of the statute having been challenged. The statute substantially provided that it shall be the duty of all railroad companies and other

carriers in the State to provide for the redemption from the holder of the whole or any parts or coupons of ticket or tickets which they, or any of their duly authorized agents, may have sold and which were unused. The statute further provides a penalty for the failure of the carrier to comply with the statute by redeeming these tickets or parts of tickets that might be unused. The statute was held to be unconstitutional in all of its provisions, in so far as it related to tickets running from in the State out or from out of the State into the State,— in other words, interstate tickets. The language of the court is as follows: —

> "The question involved in this case is whether the contracts of passage evidenced by these tickets were contracts relating to interstate commerce, and whether the penalties prescribed by the article of the statute of Texas above quoted for failing to redeem such tickets, or unused portions thereof, applies thereto. That these excursion tickets were contracts for interstate passenger traffic is too plain for discussion. They entitled the parties to a continuous passage over about five different railroads, beginning in the State of Texas and ending in the State of Kentucky, through two intermediate States. We also think that Congress, under its constitutional power to regulate commerce between the States, etc., had assumed control of the subject of interstate passenger traffic by enacting laws regulating the same. 1 Supp. Rev. St. U. S. (2d Ed.), p. 529; *Id.*, p. 684. And, as the acts here referred to show that Congress undertook to regulate such commerce, *we must presume that it prescribed all the regulations, terms, conditions, and penalties which it deemed proper or desirable, and having failed to prescribe that the unused portions or coupons of tickets in such cases as this should be redeemed, and fix a penalty for the refusal to so redeem, the presumption would obtain that that body intended that no such terms, conditions, or burdens should be imposed on such interstate traffic.*"

It will be seen that this decision of the Supreme Court of Texas is exactly in harmony with the decision of this Court in the case of Sherlock *v.* Alling, from which we have quoted above. Both decisions are squarely upon the proposition that it is within the power and province of Congress to prescribe the rules and regulations which shall affect all manner of interstate commerce, *and to declare the liability which shall follow their infraction;* and all State rules and regulations upon the subject must give way, for if Congress does not prescribe the liability for an infraction of these rules and regulations, it is equivalent to saying there shall be none, and it is not within the power of the State to prescribe any.

The Kansas statute providing the rule for trial of these cases where the action is for damages, or for the prosecution of parties under the criminal feature of the law, is in conflict with the law of Congress enacted May 29th, 1884, for the reason that that law is complete and comprehensive leaving no room for State legislation upon the question. And all State laws, whether enacted before or after the passage of the act of May 29th, 1884, are nugatory and must yield to the superior authority and power of Congress. The power to prescribe these and similar regulations, the power to pass the law of May 29th, 1884, and the power to prescribe the rules and regulations for the transportation of domestic animals, and, in fact, all the rules and regulations under that law, involves the right to declare the exclusive liability which shall follow any infraction of that law; and it is incompetent for the State to legislate upon the same question and prescribe a different set of rules and regulations conflicting with those of Congress and the secretary of the Department of Agriculture, and prescribe a different liability for an infraction of the same.

The law of Kansas does not recognize the results of the experiments conducted by the Bureau of Animal Industry

as of any value whatever. It does not recognize the right given by Congress to the secretary of the Department of Agriculture to make rules and regulations for the transportation of domestic animals into the State of Kansas. The law of Kansas does not admit cattle from south of the thirty-fourth degree of parallel of north latitude under any circumstances, thereby ignoring the law of Congress which does admit cattle from south of that line. It does not recognize the validity of inspections made either under the Federal law or under the laws of any other State; and in this respect it comes very close to the inspection law of Minnesota, which was held unconstitutional by this Court in the case of Minnesota *v.* Barber, 136 U. S., p. 313, page 862, where the Court said:—

> "It will not do to say — certainly no judicial tribunal can with propriety assume — that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food. If the object of the statute had been to deny altogether the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb, or pork from animals slaughtered outside of that State, and to compel the people of Minnesota wishing to buy such meats either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the act in question. Our duty to maintain the constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

And this court cannot shut its eyes to the effect of the laws of Kansas as construed by the Supreme Court of that State, in this case, which is to burden the carrier of interstate commerce with a liability not recognized at common law, nor recognized by the laws of Congress or the rules and regulations of the Department of Agriculture promulgated thereunder with reference to this question. Nor can this Court shut its eyes to the further fact that the language of the decision of the Supreme Court of Kansas in this case is defiant; that it denies the power of Congress over this question, and denies the authority and power of the Department of Agriculture with reference thereto; and in fact denies that any authority or power exists either in Congress or the secretary of the Department of Agriculture to make any rules which would have the effect to abrogate in any degree the statutes of Kansas.

III.

Under the Common Law, Also Under the Act of Congress May 29th, 1884, Entitled "An Act Creating a Bureau of Animal Industry," and Under the Act of Congress Entitled "An Act to Regulate Commerce," Approved February 4th, 1887, and Amendatory Acts, and Under the Act of Congress Approved June 15th, 1866, the Carrier Was Bound to Accept and Transport the Cattle in Question.

It is elementary that carriers cannot refuse a commodity which it advertises to carry, without good excuse; that it is bound to accept and transport any commodity which it professes to carry, when the same is tendered to it in the ordinary course of business. This is a general duty which the carrier owes to the public. It is not permitted to make

unreasonable examinations, or to make unreasonable inquiries as to the nature or character of any commodity which is tendered it for carriage. In this case it could make just two inquiries: First, are the cattle apparently healthy? Second, are they from north and west of the government quarantine line? If they were not from north and west of the government quarantine line, then they could not be carried by the carrier except for immediate slaughter. If they were from north and west of the government quarantine line, there was then no Federal prohibition against carrying them if they were apparently healthy.

The carrier went to the very verge in this case. It exacted conditions before accepting these cattle for carriage which it really had no right to exact, and those were permits from the Live-Stock Sanitary Board of the State of Kansas. The cattle as appears, were from north and west of the government quarantine line. They passed all reasonable inspection of the government and State inspectors. Past experience, as well as experiments made by the Bureau of Animal Industry, had developed the fact that these cattle were healthy cattle and incapable of communicating the disease known as Texas splenic or Spanish fever. This is disclosed by the testimony of Mr. Hosier, who testified that cattle had been shipped from the same ranch for three or four consecutive seasons immediately prior to 1892, and that they had never been known to communicate Texas, splenic or Spanish fever before. The locality from which the cattle came was recognized by the Bureau of Animal Industry as being absolutely healthy, and was excluded from that territory known as the infected area. There was nothing in the appearance of the cattle to arouse suspicion, except that they were from Texas and from south of the south line of Kansas. Under the rules and regulations of the Bureau of Animal Industry, they could be taken from that locality to any other locality in the

United States with absolute immunity. It is true that under the law of Kansas they were prohibited from entering the State, because of the fact that they were from south of the south line of the State; but in this respect the law of Kansas and the Federal law, as well as the rules and regulations of the Department of Agriculture, are conflicting, and from the authorities which we cite herein, the laws of Kansas must give way. It was no reason for refusing the cattle, because they were from Texas, and the carrier could not offer that as an excuse for refusing them; nor could it say that it would not receive the cattle because they were from south of the south line of Kansas. There was nothing to inform the carrier that these cattle were dangerous cattle and were capable of communicating a contagious disease, or that they were liable to do so. Although the cattle passed inspector Howard Rhodes, who represented the Live Stock Sanitary Board of Kansas at Fort Worth, Texas, and Inspector A. M. Hunter, who represented the same Board at Parsons, Kansas, yet neither of these men discovered anything in the cattle which indicated that the cattle were of a dangerous character, or that they were capable of communicating Texas splenic or Spanish fever, or were liable to do so; but on the other hand, Mr. Hunter, the live stock sanitary inspector stationed at Parsons, Kansas, stated that the cattle were all right and that he so informed the railroad company. So that outside of the fact that special permits had been given by the Live Stock Sanitary Board of the State of Kansas, admitting these identical cattle into the State, there was nothing in the character of the cattle, there was nothing in the locality or place from which the cattle were shipped, and there was nothing in the locality or ranch upon which they had been kept to indicate that these cattle were of a dangerous character, or were liable or capable of communicating Texas,

splenic or Spanish fever, and the railroad company would have subjected itself to damages to refuse to accept the cattle for shipment.

In Hutchinson on Carriers it is said, and we take this to be elementary and the settled law with reference to the question how far can the carrier go in inquiring into the nature of the property he is to carry :—

> "If the goods or packages are of the character which he usually carries, or which he purposes to carry, the only inquiry which he has a right to make is in regard to their value, and this the law allows him to do for the purpose of fixing the amount of his charge for the carriage, and of ascertaining the amount of responsibility which he is to assume, and the degree of care and attention which he will be required to exercise in respect to them."

We call attention to the case in 15th Wallace known as the Nitro-Glycerine case, wherein it was sought to charge an express company with knowledge of the contents of a package which contained nitro-glycerine which exploded in the company's office in San Francisco, doing great damage to the building in which the office was located and adjoining property. It was clearly shown that the company had no information or knowledge as to the contents of the package, but it was contended both in the Circuit Court, where the case was tried, and also in this court, that it was the duty of the company to know, and upon that question this court decided as follows :—

> "If express carriers are thus chargeable with notice of the contents of packages carried by them they must have the right to refuse to receive packages offered for carriage without knowledge of their contents. It would, in that case, be unreasonable to require them to accept, as conclusive in every instance, the infor-

mation given by the owner. They must be at liberty, whenever in doubt, to require, for their satisfaction, an inspection even of the contents as a condition of carrying the packages. This doctrine would be attended in practice, with great inconvenience, and would seldom lead to any good. Fortunately the law is not so unreasonable. It does not exact any such knowledge on the part of the carrier, nor permit him, in cases free from suspicion, to require information as to the contents of the packages offered as a condition of carrying them."

This same doctrine is sustained in the cases of

Baldwin *v.* Steamboat Co., 74 N. Y. 125;
Sheldon *v.* Robinson, 7 New Hampshire, 157;
Merchants Transportation Co. *v.* Bowles, 80 Ill. 473;
Brown *v.* Railroad Co., 83 Penn. State, 316;
Chicago *v.* Errickson, 91 Ill. 613;
Arton *v.* Sherlock, 75 Mo. 247;
Bowman *v.* Chicago &c. R. R. Co., 125 U. S. 507;
Leisy *v.* Hardman, 135 U. S. 100.

The carrier not being permitted to inquire too closely into the nature of the property it carries, may safely rely upon the information given by the owner of the property. In this case, the information given by the owner was that the cattle were healthy; that they were from his ranch in Pecos County, Texas; that they were just such cattle as he had before shipped into the State of Kansas, and that they were healthy cattle. These were the statements made by the owner. The statements made by the owner were corroborated by the investigation of the Bureau of Animal Industry, which had determined prior to the shipment of the cattle that Pecos County, Texas, was a healthy locality, and that cattle from this county shipped north were incapable of communicating Texas, splenic or Spanish fever. Past experience

in shipping these cattle also corroborated this claim, so that there was nothing to cause the company to hesitate, much less refuse the acceptance of these cattle for shipment and transportation. It cannot be presumed that the carrier has any knowledge that is not communicated to him by the owner of the cattle; and if the carrier has such knowledge, the burden is upon these defendants in error to show by a preponderance of the evidence that the carrier had knowledge of the dangerous character of the cattle, and had sufficient knowledge of their dangerous character to warrant the carrier in refusing to accept them.

IV.

Before the Carrier can be made Liable for Carrying Diseased Animals, it must be Clearly Shown that it had Knowledge of the Character of the Cattle, and that they Communicated the Disease While in its Possession or Control.

This is elementary, and we do not believe, outside of the decision of the Supreme Court in this case, that a decision can be found that even tends to sustain a different doctrine. Mr. Hutchinson in his work on Carriers says, it cannot be presumed that the carrier had knowledge of the dangerous character of the cattle and that such a doctrine would be unreasonable. Mr. Hutchinson in section 441 in his work on Carriers, says:—

> "It would be equally unreasonable to presume that the carrier had knowledge of the nature of the contents of packages carried by him when there are no attendant circumstances to awaken his suspicions as to their true character. It would be unjust to impute to him such knowledge without giving him the right, not

only to inquire of the shipper, but to examine all packages delivered to him, in case he did not choose to rely upon the information thus obtained. Unless, therefore, it be shown that he knew of the dangerous qualities of the goods, such knowledge will not be imputed to him as an inference of law. But losses occasioned to the shippers of other goods by such causes do not come within the legal exceptions to the carrier's liability, and whether he was informed or knew of the danger or not, he will be liable for such losses unless protected by his contract. But he will have his remedy against the shipper of the goods by which the losses were caused."

The Supreme Court of Kansas, in the case of Missouri Pacific Railway Company *v.* Finley, 38 Kansas, 550, also sustains the doctrine that the carrier must have notice of the dangerous character of the cattle before he will be held liable, and speaking with reference to this very statute, says:—

"That statute does not in terms dispense with the necessity of averring and proving the knowledge of the person or corporation attempted to be brought to terms. If the railway company was notified, soon after the cattle were unloaded from the wrecked train, that they were Texas cattle and liable to spread disease among domestic cattle, then it becomes its duty to use precautionary measures to prevent any damage by the communication of disease from the cattle under its charge. Upon such notice, if any was given, the statute had operation. (Laws of 1881, ch. 161; Laws of 1883, ch. 145; Laws of 1884, ch. 3.) If the company, after such notice, failed to reload the cattle at the wreck, as demanded by the farmers there assembled, but instead drove them to Hiawatha, it did so at its peril, and is liable for damages arising by the communication of disease from the cattle so driven, provided Finley was not guilty of contributory negligence. The company might have corralled the cattle

at or near the wreck, or otherwise prevented them from running at large or going upon the public highway until reloaded."

And in that case they followed the same doctrine laid down in

Patty *v.* Adams, 37 Kansas, page 133.

We also desire to call the court's attention to the case of Furley *v.* C. & N. W. R. R. Co., 57 N. W. 719:—

"The owner of the property was a resident of this State. In the fall of the year previous to the shipment complained of, Brown went to Long Beach to remain during the winter. He shipped his cow, with certain household goods, to that place, and the alleged cause of action arose when he reshipped the property to this State in the spring following. There was nothing in the appearance of the cow indicating that she had any disease. The fact appears to be that she was not diseased. She was milked during all the time she was in the south, and after she was returned to this State, and the milk was used by Brown's family. In the autumn of the following year she was fattened and slaughtered, and her flesh was used for food. There is evidence, however, to the effect that an animal acclimated in the south and removed to this State, may communicate the Texas fever to cattle here without showing any evidence of the disease itself. In view of this claim and the consideration of the fact that the defendant, as a common carrier, is bound to receive and transport freight offered for shipment, it would be unjust and unreasonable to require that it be absolutely liable to pay all damages arising by reason of the carrying of animals that may communicate contagious diseases, without allowing it to be shown that the carrier had no notice, and could not by use of reasonable care have ascertained that the animal belonged to the class, the transportation of

which is forbidden by the statute. We think the statute under consideration does not impose any such absolute liability. The business of a common carrier is not only lawful, but is absolutely essential as an agency in the transaction of the business interests and commercial affairs of the country. Under the facts in this case, the claim of appellee, in the face of the facts pleaded in the answer, is that the defendant was bound at its peril, before receiving the car, to ascertain that the animal was not in such a condition as to communicate the disease to other cattle. Under the law of this State and the act of Congress known as the "Interstate Commerce Law," the defendant was bound to receive freight in car lots, and haul it to its destination. McClain's Code, paragraph 2039, 24 Stat. 379. And the nature of the freight was such in this case that the defendant was bound to act promptly. It was liable to an action for damages if it failed to so act. The contention of plaintiff is that there is a liability for fine and imprisonment and damages for receiving and hauling the car. Suppose that the defendant was a natural person and should be indicted, and he should offer to prove the facts set up in this answer; we think there ought to be no question that it would be a great error to reject the evidence, and hold the defendant guilty of a crime, and imprison him in a county jail for six months, and fine him $1,000. There is nothing in either the letter or spirit of the statute which would sanction any such proceeding. The case is essentially different from those arising upon such police regulations as are enacted for the purpose of regulating dram shops, gambling houses and the smuggling of goods, and the like. Counsel for the appellee, in their argument in this court, say that if the construction of the statute which we have adopted is to prevail, 'it will at once become a dead letter, and may as well be repealed.' We think the fears of counsel are groundless. As we have said, the case at bar is exceptional in its facts. We hold that the defendant should be allowed to show that it was

blameless, if it can make such a showing. The rule in the Small case left that statute in full force, and recovery has been had under that law in a large number of cases, as the reports of the decisions of this court will show. The judgment of the district court is reversed."

In this last case, the property carried by the carrier was from inside of the quarantine line as established by the Secretary of the Department of Agriculture for the year 1892, the property being from the State of Louisiana; and yet the Supreme Court of Iowa held in the above cause that the carrier was not liable for transporting property from inside the infected area, unless it knew absolutely or had reasonable grounds to know, that such property was of a dangerous character. In that case the carrier received the property from a connecting carrier outside of the quarantine line, without inquiry as to its origin; in case at bar, the cattle were received from connecting carrier, but with proper assurance that cattle were from outside of infected area.

The inference to be drawn from this decision is that the court does not understand that all cattle coming from the infected area are capable of communicating disease, and that the carrier is only forbidden to carry from inside the infected area to points north and west of said area, cattle that are capable of communicating such disease. In the case at bar, the cattle were not from inside the infected area; they were entirely from the outside, and were from what was designated by the rules and regulations of the Department of Agriculture as healthy territory, and that cattle coming from this territory or locality should be regarded as healthy cattle, and no restrictions whatever upon their transportation or shipment was or should be imposed. The mere fact that the cattle are from Texas is clearly shown by the evidence in this case not to be suf-

ficient notice of the dangerous character of the cattle, for the reasons that there are portions of Texas (and the locality from which these cattle were shipped was (supposed to be) of that character) where the cattle are just as healthy as they are in Kansas or any other Northern State, and may be shipped from one section of the country to the other with perfect safety.

Then, who is to determine the character of the cattle? Is it to be the quarantine officers of the State, the secretary of the Department of Agriculture, or is it to be the carrier? The Supreme Court of the State of Kansas says, in the decision handed down by it in this case, it shall be the carrier; and, in saying that, the Supreme Court has assumed that the secretary of the Department of Agriculture has no power over this question, and that his rules and regulations are no defense to the carrier; and, in so deciding, we assert that the decision is unreasonable and erroneous.

The railway company are bound to haul the cattle at the quest of the owner, and it can only be charged with damages where the injury is the result of negligence in the handling of the cattle by the carrier. The doctrine has been very clearly announced by the Supreme Court of Missouri in the case of Salvege *v.* St. Louis & San Francisco Railroad Company, 36 S. W. Reporter, 602, where the Supreme Court of that State construed sections 953 and 954 of the Revised Statutes of Missouri of 1889. The section referred to "prohibits the transportation through the State of any Texas, Mexican, "Cherokee or Indian cattle *afflicted with Texas or Span-* "*ish fever*," and in that case the San Francisco Railroad Company, while transporting some of this class of cattle known by the carrier to be this class of cattle, through the State of Missouri, permitted some of the cattle to escape from its cars and wander over the country and spread Texas fever. A party who had sustained a loss sued the

railroad company to recover the amount thereof, and the Supreme Court of Missouri held that it must be shown by the plaintiff, before he could recover of the railroad company, that the railroad company negligently permitted these cattle to escape from its custody; and, because the plaintiff was unable to show the fact of negligence, he was denied the right to recover. In that case the railroad company were not forbidden to carry any cattle except that class of cattle that were afflicted with the disease of Texas or Spanish fever. The railroad company, in carrying the cattle through the State, was violating the sections of the Missouri statute forbidding the carrying of those cattle afflicted with that disease. No negligence was shown in the case at bar; no complaint of negligent handling of cattle was shown in the case at bar; but the claim rests upon the fact that the railroad company knew the cattle were from south of the south line of Kansas and were from Pecos County, Texas, and that it knew of the fact that the owner was to drive the cattle through the country and that the cattle did, in fact, spread Texas fever. No attempt was made to show, nor is there any evidence looking that way, that the railroad company had any knowledge of the fact that the cattle were capable of communicating the disease at the time they were received for transportation.

V.

The Railroad Company in Bringing in the Cattle in Question was not Guilty of a Violation of any Quarantine or Inspection Law Enacted by the State.

As early as 1873 the legislature of the State of Kansas recognized the right of a carrier to bring cattle into the State from south of the south line of the State (section

6707, *supra*, p. 12); it further recognized its inability to prohibit such importations, and, therefore, provided in section I of chapter 139 of the Laws of 1873 (*Id.*), for a quarantine ground where these cattle could be stopped, unloaded, inspected and kept until danger of communicating contagious disease was past, and then reshipped to the point of destination within the State. That provision is still on the statute book. The ground described is exempt from all provisions prohibiting the importation of Texas cattle, or cattle communicating this disease, and the enactment of this provision is a direct recognition of the rights of interstate carriers to bring cattle into the State of Kansas.

If the proper authorities of the State, knowing as they did in this case that such cattle were coming, could, if they had deemed the cattle dangerous, have stopped them at the quarantine ground and detained them until danger had passed; and the fact that these cattle were not placed in the quarantine ground, as provided for by the legislature in this case, indicated that the quarantine officers or State authorities considered them safe. As to whether or not they are safe cattle, by the laws of the State it is made the duty of the State Board of Live Stock Sanitary Commissioners and the State Veterinary Surgeon, who is appointed by the Governor, to investigate and determine such fact; but it is nowhere made the duty of the railroad company, or any of its employees, to investigate the question and determine for the State and be responsible in case it should fail to do so. In this connection, we desire to call the Court's attention to article 11 of chapter 105, General Statutes of 1889, which relates exclusively to the State veterinary and his duties. Section 6798, *supra*, p. 16, provides that the Governor shall appoint a competent and skilled veterinary surgeon for the State, who at the date of such appointment, shall be a graduate in good standing of

some recognized college of veterinary surgery, and who shall hold his office until his successor is appointed and qualified. The next section, *supra*, p. 17, provides for the duty of the State veterinary, and that he shall qualify by taking an oath and giving a bond for the faithful discharge of his duties, etc. Then the next section 6800 requires to investigate as to diseases of cattle in the State.

The next succeeding section, *supra*, requires him to make scientific investigation of the whole subject of diseased cattle and contemplates that the veterinary shall not confine his studies to such diseases as he may find within the State, but that he can extend his researches, his investigation and his studies to diseases of any and all domestic animals wherever such disease may appear. Not only does he study the disease from a scientific standpoint but he investigates as to the causes and the preventives and cures thereof, and he shall report the result of his study and investigation to the Secretary of the State Board of Agriculture, giving in plain and ordinary language the symptoms, etc., and how liable to be introduced and spread. When the State veterinary has complied with this section of the statute then the executive department is fully informed as to the section from which the disease may come into the State and is fully informed as to the nature of the disease, and exactly what steps are necessary to prevent its importation or to control the disease after it has been imported into the State and the manner of dealing with it and all questions relating to this matter are then left to the Live Stock Sanitary Commission, composed of three men, who, like the State veterinary, are required to take an oath for the faithful discharge of their duties, and are also required to give a bond. It is also made the duty of this board to make a study of the diseases of domestic animals and to protect the animals of the State from all diseases of an infectious or contagious character, and for such purpose

are empowered to establish, maintain and enforce such quarantine, sanitary and other regulations as may be deemed necessary.

We pass to section 6819, *supra*, p. 26, passed at the same session of the legislature, which gives the Governor power to issue a proclamation and quarantine against any dangerous, contagious or infectious disease which has become epizootic in certain localities in other States.

The Governor may get this information from the veterinary surgeon, and this section provides that even though the cattle come from section of the country in other States which the Governor understands to be affected with a contagious or infectious disease, yet he has no power to prohibit the importation of these animals, if they are covered by a certificate of health given by a *duly authorized inspector*.

In this case the defendant companies had proper *certificates of health given by a duly authorized inspector* (see page 29 of the printed record). It does appear that he was empowered by the Live Stock Sanitary Commission to issue certificates of the health of cattle being transported into the State and that he acted for them under such authority in the giving of the certificates so that under this section of the statute, even though the animals had been prohibited by the proclamation of the Governor from entering the State as dangerous cattle, the proclamation would only affect them if they attempted to enter the State without the proper certificate, and if they had the proper certificate they could then enter the State regardless of the fact that they had come from territory which, according to the Governor's proclamation, was designated as an infected area.

The cattle in question were accompanied by the certificates provided for by this section of the law. Suppose they had not been. This section provides when not

accompanied by this certificate of health that all such animals arriving in this State shall be examined without delay by the State veterinary surgeon and, if deemed necessary, placed in close quarantine until the danger of infection has passed, when they shall be released by the order of the veterinary surgeon or the Live Stock Sanitary Commission. There is no evidence in this case that the cattle imported were not examined by the veterinary surgeon of the State. It was one of his duties to examine them. The railroad company has no control over them. It is not pretended anywhere in the record that it interfered with the proper discharge of his duties or that it interfered in any manner with the proper discharge of the duties of the Live Stock Sanitary Commission. The facts are, that one A. M. Hunter, acting for the Live Stock Sanitary Com mission, was stationed at Parsons, Kansas, to investigate Southern cattle being transported over the road and that he examined these cattle and says they were all right. Their papers were all right. See page 75 of record.

In case Hunter thought the cattle dangerous it was his duty under this section of the statute to *stop* the cattle and hold them until all danger of infection had passed.

VI.

The Railroad Company is not Liable Because the Injury Complained of is too Remote.

These cattle could have been driven into the State from south of the south line of Kansas, by the owner, with consent of the State Live Stock Board. Consequently, the fact that the carrier, the plaintiff in error in this case, owned a line of railroad and permitted the owner of the cattle to ship them over its line of railroad, did

not in any way contribute to the spread of the disease. Is it to be made liable solely upon the ground that it owns a line of railroad and is engaged in the business of a common carrier — was that the only way these cattle could have been gotten into the State. Suppose the M. K. & T. Ry., stopped three miles south of the south line of Kansas and the cattle had been there unloaded and the cattle driven into the State by the owner, would the company still be liable because it had carried the cattle for the owner within three miles of the State line and thereby facilitated the passage of the cattle into the State? If the plaintiff in error is liable at all it must be made liable under some general principle of the common law for there certainly is no statute which in terms attempts in any way to make it liable. The statute refers to the owner of the cattle, and to such persons as may have the cattle in charge. The testimony in this case discloses that the railroad company never did have the cattle in charge. It could not load them or unload them. It had no control over them. If a steer was down in a car it was not the duty of railroad employees to get it up. They had no control over the cattle. The cattle were never in charge of the railroad company. It did not feed or water them. All it did was to pull the cars in which the cattle were loaded over its track and facilitate the passage of the cattle.

No importance whatever can be attached to the fact that the railroad company solicited the shipment and named a through rate from the origin of the shipment to destination. Other railroads solicited the shipment, as is clearly shown by the testimony of Mr. Hosier. Will it be claimed for a moment that because they solicited the shipment and endeavored to get it that they too are liable in this case? That is exactly where the logic of the opinion handed down in this case will lead us, if followed out to its legitimate

results. They were just as willing to bring the cattle in as was the plaintiff in error in this case.

In the opinion the Supreme Court further overlooked a question decisive of the case in this, that even though the company had violated a statute of the State of Kansas in bringing in or handling of these cattle, yet, if no damage resulted directly from its act, it cannot be held liable for damages which afterwards accrue or result from the handling of the cattle by other parties.

There is no question but what its connection with the cattle ceased upon its delivery of them to Hosier Brothers. While the railroad company may have known of the fact that Hosier Brothers were contemplating driving the cattle through the country, yet it had no power to prevent their doing so. It did not understand that Hosier Brothers would not change their intention and take the cattle in some other direction or leave them in the pasture at Hartford. The railroad company having no direct control over the cattle after delivering them to Hosier Brothers at Hartford, could not be made liable by reason of any act of Hosier Brothers in handling the cattle afterward which resulted in communicating a contagious disease to native cattle coming in contact with them. There are authorities to sustain this proposition. They are from Missouri, and the proposition decided is sound and has received the sanction of the bench and bar ever since the decision was rendered. There it was held:—

> "Though a company may have violated the statute by bringing Texas cattle into the State, it is not liable for the spread of the disease after it has parted with them and they have been driven by the owner into another county, as each transportation is a separate offense."

Surface *v.* H. & St. Jo. Ry. Co., 60 Missouri, 216;

Wilson *v.* K. C., St. J. & C. B. Ry. Co., 60 Missouri, 195;
Surface *v.* H. & St. J. Ry. Co., 63 Missouri, 452.

The statute of Missouri directly prohibited the railroad company from transporting into the State certain cattle during certain seasons of the year, and in terms made the carrier liable for damages should it do so. But the court held that the disease causing the damage must be communicated by the cattle while in the possession of the railroad company. After it had parted with the possession of the cattle and the owner had driven them into another county and there communicated the disease to native cattle the railroad company was not liable. This seems to be very sound doctrine and a complete defense in this case, but was overlooked and not considered by the Supreme Court of Kansas in this case, though well worthy of its consideration. Our statute contains no such provision. If the doctrine announced in the opinion handed down in this case is to prevail and become the law of the State, then no man can safely engage to assist the owner in driving cattle from south of the south line of Kansas without making himself liable in case damages accrue.

In this case the Court instructed the jury on the trial thereof as follows:—

> "It is the duty of anyone in the pursuit of any lawful business to exercise due care and caution that others shall not be injured thereby; and while a common carrier, such as is the defendant railway company, is bound to accept for transportation any freight tendered it which it may be lawful to carry, it must exercise due care and caution in doing this that it does not invade the rights of others, and it is not required to take for transportation or to transport any article forbidden by

the law to be transported or the transportation of which will injure others, provided it can ascertain by due diligence that such article is liable to injure or cause damage to those with whom it may come in contact during its transportation or at its destination."

The instruction had no application whatever to the facts in this case. It was not the act of the railroad company in bringing in the cattle that caused the injuries complained of by the several claimants herein. In giving this instruction, a new rule affecting carriers seems to have been evolved in the mind of the Court. Interpreting it literally, the carrier must say, when tendered cattle from south of the south line of Kansas for shipment into the State of Kansas, not only "from what section of the country do those cattle come," or, in other words, "where did this shipment originate," but he must go further and cross-examine the owner of the cattle as to what he intends to do with them at destination; if the owner is going to slaughter them, then the carrier may take them; but if the owner is going to drive them to his ranch a few miles from the station where unloaded, then the carrier must refuse to take them. It would seem that this was adding a burden to interstate commerce and surrounding it with conditions and restrictions, and as such invades the exclusive domain of Congress.

It cannot be claimed in this case that the act of the railroad company in bringing the cattle into the State spread Texas fever or communicated it to the native cattle of the State; it was after the railroad company ceased to have any connection with these cattle and they were being driven by the owner of the cattle to his ranch in the country, that the disease was communicated, and the only claim is that the railroad company assisted the owner in bringing the cattle into the State; that its agency as a carrier must make it liable equally with the owner of the property. The common law says that where one of two innocent parties

must suffer for an injury; he that did the injury is the one who shall suffer; but we know of no proposition at common law that makes the carrier liable simply because of its agency in bringing cattle into the State that shall, after having mingled with the property of the State, and when beyond the control of the carrier, communicate a contagious or infectious disease. It would seem to me that the proper course would have been, if there was any indication that the cattle were dangerous, for the State police power to have taken charge of them at destination and secluded them until all danger of contagion was past.

In the foregoing pages of this brief we have set out the laws of the United States, the regulations of the Department of Agriculture thereunder, the laws of the State of Kansas bearing upon the question of diseased cattle, the communication of contagious or infectious diseases among cattle, their transportation, and we have made an elaborate statement of the record in the case showing what the questions at issue are, and how they arose, and have followed with a lengthy argument, citing many authorities. Our apology, if any there need be, for the volume of the brief is the magnitude and importance to the transportation companies of the country of the questions involved. By a surprising and unexpected decision of the Supreme Court of Kansas the defendant company has been held responsible for large amounts of damages which it is claimed were done by the communication of the disease known as Texas or Spanish fever from the cattle of shippers over the line of the defendant's railway to the cattle of the claimants. For many years past there has been more or less excitement among the people of the Central and Northern States over the Texas fever. The nature of the disease was long, and still is, to some extent, a mystery. A striking peculiarity of it is that the South-

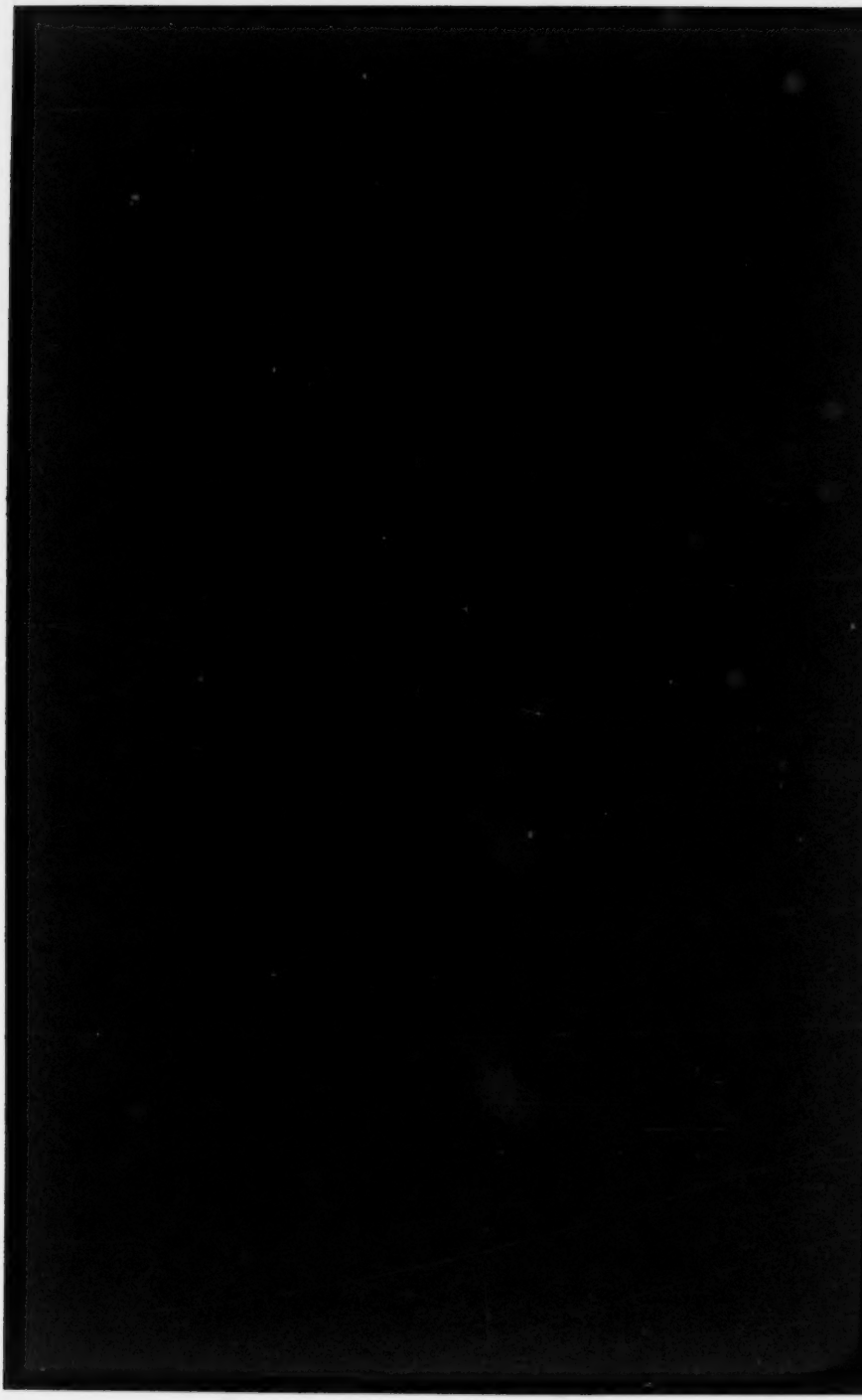
ern cattle which communicate the disease are to all intents and purposes practically healthy and sound. The scientists, the sanitary boards, Federal and State, all the wise and learned doctors, long since concluded, and still maintain, that Southern cattle coming from certain sections of the country bordering on the Gulf of Mexico, during certain periods of the year, to the North, bring with them the seeds of the disease, which may be communicated to the northern cattle when the two kinds of cattle are brought into contact with each other. In dealing with this question the legislatures, Federal and State, and the public authorities, Federal and State, have always dealt with it upon the theory that there were certain infected districts from which the disease might be brought from the South to the North. Quarantine lines have therefore been established, and have been changed from time to time, and the States have had from time to time different quarantine lines from those of the Federal government. Practical experience proved that the States were incompetent to deal with this question, and the Congress of the United States was appealed to by the people and by many of the States, notably Kansas, to pass laws upon the subject. In response to that appeal Congress has acted, and the States have generally either conformed their laws to that of Congress or acted in harmony with the Federal officials. In the case at bar the defendant company is, and has been from the beginning, innocent of any wrong-doing. It has made every effort to comply, not only with the laws and rules and regulations of the Federal government, but with those of the different States. If the decision of the Supreme Court of Kansas be affirmed, innocence, not guilt, will be condemned. Upon the demand of the owners of the Texas cattle in question the defendant company received them for transportation from a connecting carrier at the northern line of Texas, with accompanying proofs that the

cattle were healthy and had never been within the infected district as mapped out by the quarantine line of the Federal government within the times prohibited by the acts of Congress or the laws of Kansas, and likewise accompanied by permits from the Sanitary Board of Live Stock Commissioners of the State of Kansas, the tribunal having in charge, under the laws of that State, the administration of the subject of diseased cattle, authorizing the introduction of these cattle into Kansas, and carried the cattle in the cars in which it received them to their destination at the Kansas station, and there delivered them to the owners. After the Texas cattle were delivered to the owners, and the defendant company had ceased to have possession or control of them, they were by the owners brought into contact with domestic cattle, and it is claimed that by such contact the Texas fever was communicated to the domestic cattle. The only connection therefore of the railway company with the Texas cattle was the simple act of transporting them on an interstate journey. This act is the sole basis on which the liability of the company is made to rest. This act of interstate transportation cannot be burdened with a liability such as that which the Kansas courts seek to impose. This act of transportation upon the part of the company was an act done under the authority of the Federal law, and State laws cannot in either civil or criminal proceedings, hold the company responsible therefor.

In view of the transcendent importance of this case, we invoke for it this court's careful and deliberate consideration.

Respectfully submitted,

JAMES HAGERMAN AND
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 268.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
Plaintiff in Error,

vs.

CHARLES HABER *et al.*,
Defendants in Error.

In Error to the Supreme Court of the State of Kansas.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

It is not intended in this brief to set forth again the facts involved in this case. These, together with the assignments of error and many of the principles and authorities that are applicable, are stated with great clearness and detail in the brief already filed for the plaintiff in error by Mr. Hagerman and Mr. Sedgwick. There are some questions, however, that are of sufficient importance to justify the submission of an additional brief, presenting them from another point of view for the consideration of this Court. And, first, on the matter of jurisdiction.

I.

It is the right and duty of this Court to entertain jurisdiction of the case at bar.

Counsel for defendants in error in their brief seek to make it appear that there is some doubt whether there is such a Federal question involved as to give this Court jurisdiction to consider the case by writ of error to the State court. The argument by which it is endeavored to show this does not seem to us to be well founded, as an examination of the previous decisions of this Court abundantly proves that jurisdiction has been asserted by it time and again in similar cases. The jurisdiction of the Supreme Court to review by writ of error the decision or judgment of the highest court of a State is given by Section 709 of the Revised Statutes, which is substantially the same as Section 25 of the Judiciary Act of 1789. Section 709 U. S. Revised Statutes provides as follows:

> "Sec. 709. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, *or an authority exercised under the United States*, and the decision is against their validity; *or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority*, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of

> error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States (and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed).
>
> The Supreme Court may (reaffirm) reverse, modify or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

Under the terms of this section we have present here two of the grounds of jurisdiction stated. In the first place, the validity of a State statute has been drawn in question as being repugnant to the Constitution of the United States and the decision of the State court has been in favor of the validity of such statute. Secondly, a right, privilege or immunity has been claimed under the Constitution of the United States and under an authority exercised under the United States, and the State court has decided against such right, privilege or immunity.

The second defense contained in the amended answer of the Missouri, Kansas and Texas Railway Company as defendant in the State court sets forth substantially that that company is engaged in the conducting of an interstate transportation business, and that the transportation of the cattle which has given rise to this litigation was an interstate shipment of cattle (see Transcript of Record, pp. 19-20). The answer further alleges in the fourth defense that Congress had acted upon the subject of interstate commerce or shipment of cattle by the passage of the act of May 9, 1884, entitled "An Act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious

diseases among domestic animals," and by the further act of April 4, 1891, making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1892, and by the regulations issued on February 26, 1892, by the Secretary of the Department of Agriculture concerning cattle transportation, which regulations were so issued by that officer in pursuance of the authority given by the terms of the Act of May 9, 1884, above referred to.

See Transcript of Record, pp. 19–20 and 21–22.

We see, therefore, that the answer itself distinctly sets forth two defenses, presenting "Federal questions" such as are intended by the Judiciary Act to give to the Supreme Court jurisdiction by writ of error. If any further evidence of this were desired it is furnished by the Supreme Court of Kansas in the opening words of its opinion, deciding adversely to the Missouri, Kansas and Texas Railway Company the appeal which had been taken by that company from the judgment of the trial Court of the State. The Supreme Court of Kansas said:

> "The main contention of counsel for the plaintiff in error is that *this was an interstate shipment of cattle*; that the company's connection with the whole matter was that only of a common carrier; that it complied with all the regulations prescribed by the Department of Agriculture under the act of Congress; that the Federal statute and the regulations established by the Secretary of Agriculture under it is the supreme law, and in effect repeals all provisions of the laws of Kansas in any manner conflicting therewith; that the company was bound as a carrier to receive and transport the cattle because they were loaded at a point without the quarantine line established by the Secretary, and the shippers were furnished with a permit issued in accordance with the regulations governing such shipments; that it delivered them to the own-

> ers at their destination; that no injury resulted to any one from the cattle while in the railroad company's charge, and that no culpable conduct on their part is shown to have contributed to the plaintiff's loss."
>
> See Transcript of Record, p. 289.

If the shipment of cattle involved in this case was an "interstate shipment of cattle," then any statute of the State of Kansas interfering or assuming to regulate such interstate shipment of cattle, is in conflict with the Constitution of the United States and void. But the Supreme Court of Kansas in its opinion says:

> "The validity of the statutes of this State passed for the protection of domestic cattle against Texas or splenic fever, has been considered by this Court and upheld."
>
> See Transcript of Record, p. 292.

In other words, the State court decided in favor of the validity of a State statute claimed to be in conflict with the Constitution of the United States, and thus clearly gives to the United States Supreme Court jurisdiction to review the case by writ of error. The jurisdiction of this court on this ground alone is therefore beyond possibility of controversy.

As shown by the opinion of the State court, however, there was considered by that court the further question of the effect of the action of Congress on the subject of interstate cattle transportation by the passage of the acts which we have mentioned and the issuing of regulations in pursuance thereof by the Secretary of Agriculture. The plaintiff in error claimed immunity from suit on the ground that it had fully complied with all obligations imposed upon it by such acts and regulations, but the State court decided that they furnished the plaintiff in error no protection. Under these circumstances, then, counsel for defendants in error seem to think that there

has been no decision by the State court against any right, privilege or immunity claimed under Federal statutes, because, as they say in their brief (pp. 14-15), " the averments of the railroad company's answer show that it did not have any rights under any Federal law, power or authority, which could in any manner be involved in this case. The company's answer assumed things that the pleaded act of Congress did not confer but clearly denied." So far as we can understand the argument of counsel for defendants in error, it seems to be that under the construction given to the Federal act and regulations by the State court, such act and regulations gave plaintiff in error no protection, and that since they did not give any protection there has been no decision against any right, privilege, immunity or authority exercised under the United States. In other words, there being no authority there could not be any decision against such authority. It would be very strange, however, if the Supreme Court of the United States could be deprived of the jurisdiction contemplated to be exercised by it from the time of the passage of the Judiciary Act of 1789 down to the present day, by the construction given to an act of Congress by the courts of a State; or if the view of a State court as to the protection afforded by, and the scope and intent of, a Federal act were conclusive upon this Court. It that were possible, there could never be a decision by a State court against any right, privilege, immunity or authority exercised under the United States. All that the State court would have to do would be to decide that the constitution, treaty or statute of the United States which it was claimed gave such right, privilege, immunity or authority did not in fact give it. Such a doctrine is neither founded on reason nor based on authority. It need only be stated to furnish its own contradiction.

Where the decision of the State court is against an authority set up under an act of

Congress the Supreme Court of the United States has jurisdiction.

McGuire v. *The Commonwealth*, 3 Wall., 382.

Same v. *Same*, 3 Wall., 387.

And as remarked by Chief Justice Marshall in the leading case of

Cohens v. *Virginia*, 6 Wheaton, at p. 430,

on a motion to dismiss the case for lack of jurisdiction, the fact that the question before the Court on such motion was one of construction of the Constitution and of the law proved that the Supreme Court had jurisdiction.

> "The character of a case is determined by the questions involved (*Osborn* v. *Bank of United States*, 9 Wheat., 737, 824). If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not. Such is the effect of the decisions on this subject (*Cohens* v. *Virginia*, 6 Wheat., 264, 379; *Osborn* v. *Bank of United States*, 9 Wheat., 737, 824; *The Mayor* v. *Cooper*, 6 Wall., 247, 252; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S., 199, 201; *Tennessee* v. *Davis*, 100 U. S., 257, 264; *Railroad Co.* v. *Mississippi*, 102 U. S., 135, 140; *Ames* v. *Kansas*, 111 U. S., 449, 462; *Kansas Pacific* v. *Atchison Railroad*, 112 U. S. 414, 416; *Provident Savings Co.* v. *Ford*, 114 U. S., 635, 641; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11)."

See *Starin* v. *New York*, 115 U. S., 248, at p. 257.

> "Whether a suit is one that arises under the Constitution or laws of the United States is determined by the ques-

> tions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States (*Osborn* v. *Bank of the United States*, 9 Wheat., 738; *Starin* v. *New York*, 115 U. S., 248, 257)."
>
> See *Cooke* v. *Avery*, 147 U. S., 375, at pp. 384–385.

In the analogous case of the impairment of a contract by State legislation, the Supreme Court never allows itself to be deprived of jurisdiction by any decision of a State Court to the effect that there is no contract.

> "This Court has always jealously asserted the right when the question before it was the impairing of the obligation of a contract by State legislation to ascertain for itself whether there was a contract to be impaired. If it were not so the constitutional provision could always be evaded by the State courts giving such construction to the contract or such decisions concerning its validity as to render the power of this Court of no avail in upholding it against unconstitutional State legislation."
>
> *Delmas* v. *Insurance Co.*, 14 Wall., 661, at p. 668.

See also

> *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116.

Further citations of authority are unnecessary. In fact, the matter is so elementary that it would not have been discussed at such length did not counsel for defendants in error appear to seriously entertain the idea that the jurisdiction of the Supreme Court of the United States can be defeated in such a way. The question whether the act of Congress confers or denies any authority, privilege or immunity is one

that evidently depends upon the construction given to such act, and the right finally to construe it for the purpose of determining that question belongs, and properly so, to the Supreme Court of the United States. The decisions cited in the brief of counsel for defendants in error at pages 16 and 17 are all irrelevant. They deal with cases in which there have been two independent grounds for the judgment of the State court—one involving a Federal question and the other involving a question not Federal. The rules laid down in those decisions are certainly not disputed here. All that is disputed is their materiality or relevancy. If the judgment of a State court can be supported on the ground that it correctly determined a question not Federal and decisive of the case, the Supreme Court will not interfere though the State court may at the same time have incorrectly decided a Federal question. But where, as here, the whole *gravamen* of the case has been the Federal question, where it is claimed that the State statute is initially void as being an unwarranted interference with interstate commerce, and where the plaintiff in error claims that a privilege, immunity or authority which is his under Federal statutes and regulations has been denied him, the Supreme Court must and will take jurisdiction for the purpose of asserting the supremacy of the Constitution and laws of the United States as against unconstitutional State legislation, and of giving to the plaintiff in error—if entitled to it after an examination of the question by this Court—the protection which such Constitution and laws afford.

II.

The statute of Kansas on which the action of the plaintiff in the State court was based, is, so far as it affects the shipment of cattle involved in this case, or any interstate shipment of cattle whatever, unconstitutional and void.

The statute in question is Chapter 191 of the Laws of 1885 of the State of Kansas, as amended by Chapter 201 of the Laws of 1891. It forms Sections 6771, 6772, 6773, 6774, 6775, 6776 and 6777 of the general statutes of Kansas, and will be found printed in full at pages 11–14 of the brief filed on behalf of the plaintiff in error herein by Mr. Hagerman and Mr. Sedgwick.

The Federal Constitution provides as follows:

> "The Congress shall have power * * * to regulate commerce with foreign nations, *and among the several States*, and with the Indian tribes."
>
> Constitution of the United States, Art. 1, Sec. 8.

> "*This Constitution and the laws of the United States which shall be made in pursuance thereof: and all treaties made or which shall be made, under authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.*"
>
> Constitution of the United States, Art. 6.

Under the Constitution, therefore, the power to regulate interstate commerce is given to the Federal Government to be exercised exclusively through Congress. This power embraces the whole domain of interstate commerce by land and water, and

every instrumentality by which that commerce is carried on. The repeated decisions of this court on the general subject of interstate commerce regulation have established this so clearly that it is unnecessary to take up any time in its discussion. Nor is it necessary to show that the shipment of cattle which gave rise to this case was an interstate shipment, and, therefore, interstate commerce. A full statement of the authorities on these points will be found in the brief already filed for the plaintiff in error. The question has been mooted, however, as to the limitations within which a State may validly legislate, in the absence of Congressional action on any matter that comes within the field of interstate commerce regulation. That question is very clearly answered by this Court in its decision in the case of

Brown v. *Houston*, 114 U. S., 622,

from the opinion in which case we quote at some length:

> " The power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power; if, in the absence of Congressional action, the States may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, &c., still, according to the rule laid down in *Cooley* v. *Board of Wardens of Philadelphia*, 12 How., 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and where

no regulation is imposed by the Government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that that commerce shall be free and untrammelled; and any regulation of the subject by the States is repugnant to such freedom. This has frequently been laid down as law in the judgments of this Court. In Welton *v.* State of Missouri, 91 U. S., 282, Mr. Justice Field, speaking for the Court, said: 'The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled.' This was said in a case where the plaintiff in error had been convicted of selling goods without a license under a law of the State of Missouri, which prohibited any person from dealing as a peddler without license, and which declared that a peddler was one dealing in goods or wares, not the growth, produce or manufacture of this State (Missouri), by going from place to place to sell the same.' To the same purport, and on the same subject generally, see *Gibbons* v. *Ogden*, 9 Wheat., 1209; *License Cases*, 5 How., 504, 575, 592, 594, 600, 605; *Passenger Cases*, 7 How., 282, 407, 414, 419, 445, 462-464; *Crandall* v. *Nevada*, 6 Wall., 35, 41-49; *Paul* v. *Virginia*, 8 Wall., 168, 182-184; *Ward* v. *Maryland*, 12 Wall., 418, 430-431; *State Tax on Railway Receipts*, 15 Wall., 284, 293; *The Lottawanna*, 21 Wall., 558, 581; *Henderson* v. *Mayor of New York*, 92 U. S., 259; *Sherlock* v. *Alling*, 93 U. S., 99; *Railroad Co.* v. *Husen*, 95 U. S., 465; *Cook* v. *Pennsylvania*, 97 U. S., 566; *Guy* v. *Baltimore*, 100 U. S., 434; *Tiernan* v. *Rinker*, 102 U. S., 123; *Packet Co.* v. *Catlettsburg*, 105 U. S., 559; *Transportation Co.* v. *Parkersburg*, 107 U. S., 691, 701; and see *Moran* v. *New Orleans*, 112 U. S., 69."

See *Brown* v. *Houston*, 114 U. S., at pages 630-631.

In the absence of congressional action the States may only regulate matters of local interest and merely incidentally affecting interstate commerce. But where the matter is national in character and admits of one uniform system or plan of regulation, no State has power to make any law or regulation whatever. This brings us to the consideration of the effect of the Kansas statute which is involved in the present case. That statute prohibits any person between the first day of February and the first day of December of any year from driving or causing to be driven into or through any county, or part of a county, in the State of Kansas, any cattle "capable of communicating or liable to impart what is known as Texas, splenic or Spanish fever." The violation by any person of such prohibition is a misdemeanor, punishable by fine and imprisonment. The statute further provides that any person who shall drive, ship or transport, or cause to be shipped, driven or transported into or through any county in the State of Kansas, any cattle "liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle" of the State shall be liable to any persons injured thereby for all damages that the persons so injured may sustain by reason of the communication of the disease, such damages to be recovered in a civil action in any court of competent jurisdiction. It then goes on to say that, in the trial of any person charged with the violation of any provision of the act and in the trial of any civil action brought to recover damages for the communication of the disease known as Texas, splenic or Spanish fever, proof that the cattle which such person is charged with shipping or driving, or which are claimed to have communicated the disease were brought into the State of Kansas from south of the 37th parallel of north latitude, which is the southern boundary line of the State of Kansas, shall be taken as *prima facie* evidence that such cattle were between the first day of February and the first day of December of the year in which the offense was

committed "capable of communicating and liable to impart Texas, splenic or Spanish fever within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full and complete notice thereof." This statute, it will be seen from the outline here given, makes a misdemeanor punishable by fine and imprisonment of the same act for which it gives to a party claiming to be injured a civil action for damages, and the same rule of evidence is created by the statute to apply to the trial of a person charged with such a misdemeanor as is created under the statute to apply to the trial of such civil action.

Considering the statute as a whole and with reference to the case at bar, it is important for the Court to look very closely into its penal provisions. We therefore set out again enough of those provisions to enable the Court to see their scope and effect:

> "Section 6771. No person or persons shall, between the first day of February and the first day of December of any year, drive or cause to be driven into or through any county or part thereof in this State, or turn upon or cause to be turned or kept upon any highway, range, common or pasture within this State, any cattle capable of communicating or liable to impart what is known as Texas, splenic or Spanish fever. Any person violating any provisions of this act shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and shall for each offense be fined not less than five hundred dollars nor more than two thousand dollars, or be imprisoned in the county jail not less than thirty days and not more than one year, or by both such fine and imprisonment."
>
> "Section 6775. In the trial of any person charged with the violation of any provisions of this act * * * proof that the cattle which such person or persons are charged with shipping, driving, or keeping, * * * were brought into this State from south of the thirty-seventh parallel of north latitude,

> shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offense was committed, capable of communicating and liable to impart Texas, splenic or Spanish fever, within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full knowledge and notice thereof."

Now, it will be noticed that the offense or misdemeanor which is created by the statute consists in the driving or keeping of cattle "*capable of communicating or liable to impart Texas, splenic or Spanish fever*," and not necessarily actually afflicted with that disease. When, therefore, the statute makes the fact that the cattle come from south of the southern boundary line of Kansas *prima facie* evidence that they are capable of communicating and liable to impart Texas fever, it practically makes such fact conclusive evidence against the person charged with the offense. In one sense any cattle are "*liable to impart*" or "*capable of communicating*" disease, and disproof of such "liability" or "capability" would, in any case, be a very difficult matter. To make, by a statutory enactment, all cattle from south of a certain line *prima facie liable or capable of communicating the disease*, is therefore equivalent to conclusively declaring them so *liable or capable*. That is to say, the statute practically declares every man guilty of an offense created by it who brings into the State of Kansas between the first day of Febuary and the first day of December (or during ten months of the year) any cattle that come from south of the line mentioned. This statute is in its penal provisions certainly unconstitutional, in that it deprives persons prosecuted under it of the presumption of innocence, and therefore takes away their liberty without due process of law.

> "FIRST.—We may mention that the humanity of our law always presumes an ac-

> cused party innocent until he is proved to be guilty. This is the presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact."
>
> *Cooley's Constitutional Limitations*, 6th Ed., p. 375.

And Judge Cooley also says (Constitutional Limitations, p. 377) that this presumption of innocence can only be overcome either, "first, on confession in open Court; or second, on proof which places the guilt beyond reasonable doubt." In the case of

State v. *Divine*, 98 North Carolina, p. 778,

the Supreme Court of North Carolina had under consideration a statute passed by that State which made the fact of killing of cattle by a railroad train *prima facie* evidence of negligence, and also made such negligence a misdemeanor on the part of the superintendent and president of the railroad company. The Court held the statute unconstitutional as depriving the persons charged with the misdemeanor of the presumption of innocence.

See *Cooley's Constitutional Limitations*, 6th Ed., p. 375.

This presumption of innocence is held to be part of the constitutional guarantee to every person that he shall not be deprived of his life, liberty or property without due process of law, and as part of such constitutional guarantee, it has been upheld by this and other Courts. In the case of

Cummings v. *Missouri*, 4 Wallace, 277,

in which the Supreme Court of the United States declared certain clauses of the Constitution of the State of Missouri in conflict with the Constitution of the United States, Mr. Justice Field, writing the opinion, says:

"The clauses in question subvert the presumptions of innocence and alter the rules of evidence which heretofore, under the universal recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty."

See *Cummings* v. *Missouri*, 4 Wallace, at p. 328.

"Precisely how far the Legislature may go, in changing the modes and forms of judicial proceeding, I shall not attempt to define, but I have no hesitation in saying that they cannot subvert that fundamental rule of justice which holds that every man shall be presumed innocent until he is proved guilty. This rule will be found specifically incorporated into many of our State Constitutions, and is one of those rules which in our Constitution are compressed into the brief but significant phrase, 'due process of law.'"

Wynehamer v. *The People*, 13 N. Y., 378; Opinion of Selden, *J.*, at p. 446.

From these decisions it sufficiently appears that the penal provisions of the statute of Kansas, which is under consideration in this case, subvert the presumption of innocence, and are therefore unconstitutional and void as depriving the person who is tried, of his liberty without due process of law. The statute might, as far as the legal effect of it is concerned, as well have declared every person guilty of a misdemeanor punishable by fine and imprisonment who transports or drives into any county of the State of Kansas cattle coming from south of the southern boundary line of that State. Or, to express the same thing in another way, it prohibits common carriers of interstate traffic as well as all other persons, including citizens of the State of Kansas, from carrying or importing into that State any cattle coming from south of the southern boundary line of the State, by attaching a criminal liability to such carriage or importation. Another

step and the Court will perceive the far-reaching importance of this as bearing upon the case at bar.

The Kansas statute which is here in question must be read as a whole, and each part of it must be considered in the light of all its other parts. As we have shown, it prohibits the importation of cattle into Kansas from any place south of that State, and makes such importation punishable by fine and imprisonment. It goes further and gives to any person who claims to have been injured a right of action for damages, and applies to the trial of such action the same rule of evidence which, when applied to the criminal trial, deprives the person tried of his constitutional protection. And if that rule of evidence when applied in the criminal trial fails to give that "due process of law" to which every person is entitled before he can be deprived of his liberty, then the same rule of evidence applied to the trial of a civil action must be likewise held to fail to give the "due process of law" to which a person is equally entitled before he can be deprived of his property. That is a necessary inference from which there is no escape. In the trial of such a civil action, all cattle that come from south of the southern boundary line of Kansas are, under the statute, held to be *prima facie* liable to communicate Texas fever, and more than this, the owner or person in charge of such cattle is *prima facie* taken to have knowledge and notice thereof. If this—in the event of a verdict against the defendant in such civil action and of a judgment based thereon—does not deprive such defendant of his property without "due process of law," then it would be difficult to frame a confiscatory statute that would do so. Both the criminal and penal parts of the Kansas law are, therefore, equally unconstitutional and void, and the law as a whole cannot stand.

Now then, what is the effect of this law when considered with reference to the particular issues arising in the case at bar? Is it merely a regulation of a matter of "local interest only incidentally af-

fecting interstate commerce," such as a State may validly enact in the absence of Congressional action on the subject? Or is its effect to place such a burden upon interstate shipments of cattle as to make the statute an unwarranted interference with interstate commerce? We do not see any room for the slightest doubt that the statute belongs in the latter category. Its evident purpose, speaking plainly from the terms in which it is drawn, is to completely bar out from the State of Kansas for ten months of every year—and power to do so for ten months of the year would imply equal power to do so for the entire year—any cattle that come from south of the southern boundary line of that State. The Legislature might just as well have declared so in words; the purpose is there and that certainly is, in most instances, the practical effect.

If this be true, it will require no further argument to show that such a statute is an unwarranted attempt to interfere with interstate commerce, places a burden upon such commerce, and is, therefore, unconstitutional and void, and we need only refer this Court to the case of

Railroad Co. v. *Husen*, 95 U. S., 465,

which is decisive of this very point, and extracts from which will be found quoted at length in the brief already filed for the plaintiff in error.

Much latitude has been allowed the States in exercising their rather vaguely defined police power for the purpose of protecting the health and morals of their people and the safety of their property. But there is a point beyond which this latitude cannot go, and no State will be permitted, under the guise of exercising its police power, to infringe upon one of the great powers of Congress exclusively conferred upon that body by the Federal Constitution.

> "The Courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the in-

> quiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution.
>
> *Mugler* v. *Kansas*, 123 U. S., 623, at p. 661.

See also

Brimmer v. *Rebman*, 138 U. S., 78;
Minnesota v. *Barber*, 136 U. S., 313,

and the many other authorities cited in the brief already filed.

Scott v. Donald - 165 U.S. p. 58- 91-95-98.

A legitimate inspection law, passed by a State in the exercise of its police power, is one thing; attempted regulation of interstate commerce amounting to prohibition by one State under the guise of a quarantine law of the importation of an important commercial product of other States is quite another. The statute of Kansas which is here being passed upon is a plain attempt to interfere with interstate commerce. In fact, it goes as far in that direction as any statute that has ever come before this Court for its consideration. It is in conflict with the Federal Constitution and of no legal force or validity.

The Supreme Court of Kansas, in its opinion (Transcript of Record, pp. 292-293), has endeavored to argue that the case of *Railroad Co.* v. *Husen*, above cited, would justify the passage by a State of a statute like the Kansas statute in question, and the Court quotes from the opinion in that case the following extract:

> "It (a State) may exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or in-

> fectious diseases; a right founded, as intimated in *The Passenger Cases*, 7 How., 283, by Mr. Justice Greer, in the sacred law of self-defense. *Vide* 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases."
>
> See *Railroad Co.* v. *Husen*, 95 U. S., at p. 471.

But the Supreme Court of Kansas is entirely wrong in the conclusion which it draws, as is shown by the first sentence of the next paragraph of the opinion in the *Railroad Co.* v. *Husen case*, which is to the following effect:

> "*But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government.*"
>
> See *Railroad Co.* v. *Husen*, 95 U. S., at p. 471.

While a State may exclude from its limits cattle "having," as the Court says, "contagious or infectious diseases," and therefore *proved to be dangerous*, it cannot do what Kansas has attempted, namely, to burden the importation of all cattle, whether proved to be dangerous or not, and thus to interfere with interstate commerce, "a subject confided exclusively to Congress by the Federal Constitution." Nor does the case of *Kimmish* v. *Ball*, cited by the Supreme Court of Kansas in its opinion (Transcript of Record, p. 293), strengthen that Court's argument in any way. It is not in point at all. In that case the State of Iowa had passed a statute providing that any person *having in his possession* "Texas cattle" should be liable for any damages accruing from allowing them to run at large, and thereby spread the disease known

as "Texas fever." That statute had nothing whatever to do with interstate commerce, and applied merely to property belonging to and in the possession of citizens of the State, and therefore *mingled with* the property properly under the jurisdiction of State laws. A previous section of the Iowa statute was directed against the importation of Texas cattle into the State of Iowa, except under certain restrictions, and the Supreme Court of the United States specifically distinguished between that section of the statute and the section making persons liable for damage accruing from allowing Texas cattle to run at large within the State, which latter section only was before the Court:

> "Section 4059, with which we are concerned, provides that any person who has in his possession in the State of Iowa any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large, and thereby spread the disease. We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate interstate commerce. We do not see that it has anything to do with that commerce; it is only levelled against allowing diseased Texas cattle held within the State to run at large. The defendants labor under the impression that the validity of Sec. 4058, which is directed against the importation into the State of such cattle unless they have been wintered North, is before us, and that a consideration of its validity is necessary in passing upon Sec. 4059, but this is a mistake."
>
> See *Kimmish* v. *Ball*, 129 U. S., at pp. 220-221.

The Supreme Court of Kansas is wrong, both in its argument and in its conclusions. The cases which it cites do not aid or strengthen the reasoning by which it attempts to sustain the Kansas statute. That statute is, as we have shown, unconstitutional, both because it deprives a person of his liberty and

property without due process of law, and because it interferes with and attempts to regulate interstate commerce. With reference to the issues of this case, it must be declared void on the latter ground, and the plaintiff in error must be relieved of the damages in which it has been mulcted, because the statute under which those damages were recovered is an illegal interference with the interstate shipment of cattle, out of which this case arose.

III.

Even if the enactment by the State of Kansas of the statute in question were not inherently void as a regulation of interstate commerce—which it is—that statute cannot stand as against Federal legislation on the same subject with which the statute is inconsistent.

Congress has acted on the entire subject of interstate shipments of cattle, and all State laws inconsistent with the Federal laws and regulations are void.

We shall not take up any time in showing that the act of Congress of May 29, 1884, entitled "An Act for the establishment of a bureau of animal industry to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals," and the rules and regulations adopted by the Department of Agriculture in pursuance of the authority and directions given by said act, together provide a uniform plan or system governing all interstate shipments of cattle. That has been shown at length and so clearly by the brief filed for the plaintiff in error by Mr. Hagerman and Mr. Sedgwick, as to

obviate the necessity of saying anything upon the subject. Under this uniform plan or system of regulation formulated by Congress and the Federal Department of Agriculture, a section of the country is mapped out which is called or known as the infected area and from within which no cattle are to be shipped, except under stringent regulations for disinfection, which are prescribed. No restriction whatever—except against the shipment of cattle by any transportation agency with knowledge that such cattle are affected with a contagious or infectious disease*—is placed upon the shipment of cattle from outside of the infected area, so that such shipment from outside the infected area is left absolutely free and untramelled. Now then, if the Federal regulations on the subject of interstate cattle shipments do establish a uniform plan or system of regulation national in its scope, as they do, and if under such national system of regulation shipments from outside the infected area are left free and untrammelled, then it certainly follows that any State enactment which burdens or prohibits or in any way interferes with or assumes to regulate such interstate shipment from outside the infected area as declared by the paramount authority, is inconsistent and in conflict with the national system of regulation. That is exactly the situation with regard to the Kansas statute, which we are discussing. For that statute assumes to regulate and place a burden upon shipments of cattle from any point south of the southern boundary line of the State of Kansas whether such point be outside the infected area or not. The Supreme Court of the United States is therefore confronted with the question which of the two enactments in conflict with each other, that of the State of Kansas or that of the Federal Congress and Federal Department of Agriculture, is to be sustained. The mandate of the Constitution of the United States which

*We shall deal with that question in Point IV.

prescribes that such Constitution and all laws made in pursuance thereof shall be the supreme law of the land, furnishes, we think, the simplest answer to that question. No State statute can stand as against Federal legislation validly enacted, and the statute of Kansas under consideration in this case must therefore be declared invalid as being in conflict with the supreme law of the land.

The labored effort of the Supreme Court of Kansas in its opinion to prove that the Federal regulations and State statute are not in conflict is not, it seems to us, deserving of much consideration, because that Court failed altogether to point out the important points of difference between the two enactments. And of these the most important of all is the fact that the Federal law leaves the shipment of cattle from outside of the infected area established by it absolutely free and untrammelled, whereas the State law, if it is allowed to stand, subjects such shipments from outside of the infected area, if they come from south of the southern boundary line of Kansas, to the greatest possible burdens, amounting to prohibition. Again the Federal law creates absolutely no liability for violation of its provisions on the part of the carrier unless such carrier has been knowingly guilty, while the State law practically convicts it of violation and subjects it to civil and criminal liability before trial, by establishing a new rule of evidence of presumptive negligence, of notice and in fact of guilt, which it is difficult, if not impossible, to rebut.

The regulations of the Secretary of Agriculture, which are made under the authority and by the direction of the Act of Congress must be taken to have the same force and sanction as though they were contained directly in the Act of Congress itself. Now the regulations of that officer for the year 1892, in which this particular cattle shipment took place, after stating what constituted the infected area, prohibited the transportation (except for immediate slaughter) of any cattle from such area, between the

first day of *March* and the first day of December (see Transcript of Record, p. 27). The Kansas statute on the other hand burdens the importation into that State of all cattle, whether healthy or diseased, whether coming from outside of the infected area or not, between the first day of *February* and the first day of December (see Brief already filed for plaintiff in error, pp. 11 and 14). Certainly a very material variance between the two enactments.

In Section 6 of the Federal Act we find the following provision:

> "*Provided*, that the so-called splenic or Texas fever shall not be considered a contagious, infectious or communicable disease within the meaning of sections four, five, six and seven of this act as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto."
>
> See brief already filed for plaintiff in error, p. 4.

Under this provision it will be noticed that cattle actually affected with Texas fever might, on an interstate shipment, be brought into the State of Kansas, provided they were intended for slaughter. Under the Kansas statute, however, the fact that they were intended for slaughter would make no difference, and the bringing of such cattle into that State would make the person or carrier doing so guilty of a misdemeanor punishable by fine and imprisonment, and subject to an action for damages.

All these points of difference and many others the State Court entirely forgot to mention, and the conclusion at which it arrived under the very inadequate comparison of the two enactments which it made is, therefore, worthless:

> "It seems entirely clear to us that in the passage of this act Congress exercised its power to regulate commerce between the States in aid of the States in their efforts to prevent the spread of diseases among domestic

> animals and to assure purchasers of animals exported from this country for slaughter of their healthful condition. There is nothing whatever in the act prohibiting the States from enacting and enforcing regulations to extirpate and prevent the spread of contagious diseases, but, on the contrary, the States are in effect asked to be more active and vigilant in their efforts in that direction."
>
> See opinion of Kansas Supreme Court, Transcript of Record, p. 292.

This is in no way true. The act of Congress, as we have shown, was intended to provide a uniform and national system for the regulation of all interstate shipments of cattle. Certainly, this was a measure in aid of the States, but only in the way that all congressional legislation may be deemed to be in aid of the States and of their people. The Federal act asked no aid from any State. It did say that:

> "Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State of Territory in which pleuro-pneumonia or other contagious, infectious or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, *and such plans and methods shall be accepted by the* Commissioner of Agriculture, and whenever the Governor of a State or other properly constituted authorities signify their readiness to co operate for the extinction of any contagious, infectious or communicable disease *in conformity with the provisions of* this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another."
>
> See brief already filed for plaintiff in error, p. 3.

There is nothing in the case to show that the Kansas statute was ever accepted by the Federal Department of Agriculture, and that statute is certainly not "in conformity with the provisions" of the act of Congress. On the contrary, it is directly inconsistent with that act, and it must therefore fall as all State statutes fall when they conflict with Federal legislation on any matter which, under the Constitution of the United States, is to be regulated by the Federal Government.

With less force still, could it be claimed that the statute of Kansas is in aid of the Federal enactment, if there be any such thing as State legislation to strengthen what is usually supposed to be the paramount power of the Federal Government. The act of Congress was passed in 1884. Kansas, on the other hand, had had laws on the subject of cattle transportation for many years before that. And it is noteworthy that all the laws of that State on this subject which were passed before 1884, the year of Federal legislation, seem to have been directed only against cattle actually diseased. Thus, in 1881, the Kansas Legislature passed a law providing:

> "That no person or persons shall drive or cause to be driven into or through any county in this State any cattle *diseased with a disease* known as Texas, Splenic or Spanish fever," * * * &c.
>
> See Kansas General Statutes of 1889, Vol. 2, p. 2057.

This statute said nothing whatever to the effect that all cattle from any place south of Kansas should be presumptively diseased, and that persons bringing any cattle into Kansas from south of that State should be fined and imprisoned and mulcted in damages. The only reference in it to the matter of evidence is that cattle of "wild and undomesticated habits" might be taken as *prima facie* diseased, a regulation which, as based upon study and facts

with regard to cattle diseases, it was entirely competent for the Legislature to make.

See Kansas General Statutes of 1889, Vol. 2, page 2059.

Such a law, aimed exclusively at cattle actually diseased, is concededly within the police power of a State, and valid, and if Kansas had only kept within the reasonable limits of the Statute of 1881, the Supreme Court of the United States would never have been burdened with the consideration of this case. But it would seem that no sooner had Congress passed the Act of '84, than Kansas, instead of retaining a law whi was validly enacted and under which the domes cattle of the State would be amply protected against disease, started in to pass laws of the most drastic character inconsistent and conflicting with the Federal statute and framed as if to emphasize the indifference of the Kansas authorities to the regulations of the National Government. The objects aimed at by the act of Congress of May 9, 1884, namely, the creation of a uniform system for the regulation of interstate shipments of cattle all over the United States, might have been helped by the Kansas statute of 1881, a legitimate quarantine law directed against cattle actually diseased, whereas they are defeated by a statute which, like the one we are considering, places an intolerable burden on interstate commerce in healthy cattle coming from sections of the country which, after an investigation by the Federal authorities, have been found to be free from disease, and trade from which should, as a matter of public policy, therefore not be restricted. To say that the Kansas statute, after what we have shown to be its plain purpose and necessary effect, is a statute in aid of Federal legislation, would be absurd.

But there is yet more evidence of the inconsistency of the Kansas statute with the objects of the Federal

act. The plaintiff in error is a common carrier, and as such carrier was under an obligation to accept in Texas the cattle of Hosier Brothers for transportation and delivery. Had it refused to do so it would have been liable to an action for damages by the intending shippers in the State of Texas, the authorities of which State have never been backward in awarding damages against railroad corporations or in compelling them to perform every act which is technically part of the duty of a common carrier. In such action the Kansas statute would have afforded the plaintiff-in-error no defense, yet when the cattle arrive at the border of Kansas, it is punished under the statute for bringing them there. Liable in damages in Texas for not accepting the cattle for carriage into Kansas; liable in damages in Kansas for accepting and carrying them. Is this just, or can it possibly be sanctioned by the Supreme Court of the United States? We think not. For it is exactly this result of the Kansas statute which shows the conflict between that statute and the enactments of the Federal Government. It is exactly this result—which must inevitably follow from inconsistent and heterogeneous legislation by the different States—that Congress intended to abolish by creating one uniform consistent system of regulation, embracing all the states and protecting all alike without unjustly burdening any of them. The Statute of Kansas is directly subversive of the system so created, and it must consequently be declared invalid, unless the State of Kansas is conceded to have a degree of sovereign power greater than that of any other State in the Union, and amounting practically to independence of the Federal Constitution and of Federal laws.

IV.

The action in the State Court was based solely upon the State statute. But even if it had not been, and if the action had been brought under the Federal statute, or at common law, there is nothing in the case which would make the plaintiff in error liable.

That the action of the plaintiff in the State court was based upon the State statute is shown by the opinion of the Supreme Court of Kansas, which says:

> "The first question to consider is whether there is really any conflict between the act of Congress *and the State statute, on which the plaintiff's cause of action is based.*"
>
> See Transcript of Record, p. 289.

An inspection of the amended petition in the Court below shows this conclusively.

See Transcript of Record, p. 8.

But let us suppose that the action had not been so brought, and that under his amended petition the plaintiff in the Court below was at liberty to proceed either under the Federal statute or at common law. He certainly would not have been able to recover. In the first place, the Federal statute does not provide for any civil action for damages. Secondly, and what is more important, no carrier or railroad company can be subjected to the liability created by the Federal statute (namely, punishment of the officials or agents of such carrier or railroad company for a misdemeanor), unless it is shown that such carrier or railroad company has "*knowingly*" violated the provisions of the act. We quote here the sections of the Federal statute that are relevant:

> "Sec. 6. That no railroad company within the United States, or the owners or masters

of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia. * * *

Sec. 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall *knowingly* violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

See pages 4 and 5 of brief already filed for plaintiff in error.

The same thing is true at common law. That a railroad company must have knowledge of the dangerous character of property carried by it before it can be liable for any damage caused by such dangerous property is elementary. Now, the plaintiff in error in this case had no such knowledge; it did not have the slightest ground for suspicion that the cattle which it shipped were dangerous. On the contrary, it had every reason to believe that they were in a sound and healthy condition. Those cattle came from outside the infected area established by the regulations of the Federal Government, and permits for their shipment into Kansas had been duly procured from the proper

officials. To require anything more of a railroad company doing a vast interstate traffic business would be as unreasonable as it would be impracticable. But if any further evidence were needed to show that the plaintiff in error had no actual knowledge or notice of the alleged unhealthy condition of the cattle carried by it, it is given by the answers of the jury in the State trial court to some of the special questions propounded to such jury on behalf of the defendant company:

> "1. Did the railroad company have any actual notice that these cattle or any of them were from the infected district of Texas?
>
> Answer. No.
>
> 8. Did not Hosier Brothers send two men with each train of cattle, and was it not the duty of such men to look after and care for the cattle?
>
> Answer. Yes.
>
> 9. Did the trainmen or employees of the defendant in charge of the train have anything to do with the handling of the cattle or with the loading or unloading of them?
>
> Answer. No.
>
> 10. Was it not the duty of the trainmen in charge of the train in which the Hosier Brothers' cattle were shipped to simply look after the management and operation of the train?
>
> Answer. Yes.
>
> 11. Is it not a fact that all the information given to the railroad company by Hosier Brothers and by Francis Brogan was to the effect that said cattle were from Pecos County, Texas?
>
> Answer. Yes.
>
> 12. Is it not a fact that by the rules and regulations of the Honorable Jeremiah M. Rusk, Secretary of the Department of Agriculture, establishing a quarantine line, Pecos County, Texas, was entirely west and outside of said line?
>
> Answer. Yes; we suppose so.
>
> 14. Is it not a fact that Texas fever can be communicated to native cattle by other means than the Texas cattle tick?
>
> Answer. Yes.

15. Is it not a fact that cattle from north and west of the Government quarantine line are not supposed by the Bureau of Animal Industry to be inoculated with germs of Texas fever and are supposed to be incapable of communicating it to native cattle?

Answer. Yes; that's the supposition.

21. It it not a fact that the Bureau of Animal Industry kept an inspector at Fort Worth, Texas, and one at Parsons, Kansas, whose duty it was to inspect all cattle shipped north over the lines of the railroad company through those places and to stop all cattle coming from inside of the quarantine line or infected area?

Answer. Yes.

22. Is it not a fact that said inspectors determined by the brands of cattle whether they are from north and west of the Government quarantine line?

Answer. Yes.

23. Is it not a fact that these cattle were branded with Hosier Brothers' brand?

Answer. The most of them.

25. Did not such brands indicate that said cattle were from west of the Government quarantine line?

Answer. Yes.

26. Is it not a fact that the railroad company delivered the cattle to Hosier Brothers at Hartford, and until such delivery no Texas fever was communicated by them and no damage done to the plaintiff or any of the claimants suing under their cross-petitions?

Answer. Yes.

27. If you find that the cattle communicated Texas fever, is it not a fact that such fever was communicated by the drive across the country from Hartford to the Brogan pasture, in Chase County, and the placing of the cattle in such pasture?

Answer. Yes.

28. Who were the owners of these cattle at the time they were driven from Hartford to the Brogan pasture?

Answer. Hosier Bros.

29. Is it not a fact that Hosier Brothers, the owners of the cattle, by their agents, the

Brogans, drove the cattle from Hartford to the Brogan pasture?

Answer Yes; it is alleged so."

See Transcript of Record, pp. 272–274.

These answers show that the plaintiff in error had no knowledge or notice that the cattle were dangerous, but that, on the contrary, as the plaintiff in error knew, they came from outside of the infected district which was supposed to make them incapable of communicating the Texas fever disease. More than this, they show that no damage whatever was caused by the cattle while in the possession of the railway company, and that if any damage was caused by such cattle, it happened altogether after they had passed out of the plaintiff in error's possession and control. The essential element necessary to fix upon plaintiff in error any liability under the Federal statute or at common law—namely, knowledge that the cattle were dangerous or infected with disease—is therefore entirely absent in this case, and the judgment recovered in the State court was erroneous, whether the action was brought under the State statute or not, since that judgment could never have been recovered had not plaintiff in error been subjected to the presumption of guilt and knowledge which that statute created.

It is true that the Supreme Court of Kansas in its opinion says that "even if this were an action at common law for negligently spreading the disease * * * a very strong case is made by the testimony against the company" (Transcript of Record, p. 295), and that counsel for plaintiff in error try to make much of this statement in their brief. But we would point out that the answers of the jury to the special questions above quoted are conclusive upon the facts of the case, and that those answers show that the statement of the Kansas Court is incorrect. The ticks which, as the Supreme Court of Kansas says, "are regarded as a strong, if not absolutely certain, indication that the cattle are

capable of communicating the disease," and which it claims "were plainly and easily discernible on many of the cattle," are as a matter of fact not necessarily indicative of the dangerous condition of the cattle at all. The testimony shows that there is no difference in size and appearance between the ordinary wood tick, which is often found on cattle and is entirely harmless, and the Texas fever cattle tick, and that it would take an expert to be able to distinguish the difference.

Transcript of Record, p. 157.

Certainly there is no rule of law that requires a carrier to be an expert in cattle ticks and cattle diseases. Nor can we concur with the Supreme Court of Kansas in the statement that there is "no inconsistency between the special findings and the general verdict of the jury." The jury's special findings are absolutely inconsistent with the verdict and judgment against the plaintiff in error. While the instructions of the trial Court to the jury may have been proper enough from the standpoint of a Kansas Judge required to enforce a Kansas statute, they certainly fell far short of being just or what the Supreme Court of Kansas calls "eminently fair." The trial Court did instruct the jury that:

> "12. It is not necessary in order to enable the plaintiff and cross-petitioners to recover from the defendant railway company that said company, its agents or employees, should have actual knowledge that these cattle which it transported to Hartford were dangerous or liable to communicate to native cattle the Texas fever. It is sufficient to make defendant company liable if such agents and employees had reason to know that such cattle were dangerous and could have known it by the exercise of ordinary care and diligence."
>
> Transcript of Record, p. 269.

But it also instructed the jury that:

> "5. The statute of this State makes the fact of bringing any cattle from south of the south line of Kansas, between the first day of

February and the first day of December, *prima facie* evidence that such cattle were capable of communicatiug and liable to impart Texas, splenic or Spanish fever, and that the person in charge of such cattle had full knowledge and notice of their ability to impart such disease to the native cattle."

Transcript of Record, p. 268.

So that we see that in the view of the Kansas Court, which was also, of course, impressed upon the jury, the mere fact that the cattle came from south of the southern boundary line of the State of Kansas was sufficient to impute knowledge of their dangerous condition to the railway company. It is impossible to come to any other conclusion than that such knowledge was not shown, and was only inferentially imputed to the plaintiff in error through the operation of the unjust rule of evidence created by the Kansas law. And with such proof of knowledge on the part of plaintiff in error wanting, the judgment of the State court cannot be supported either from the standpoint of the common law or of the Federal statute.

Gulf, Col. & S. F. R. R. vs. Ellis, 165 U. S. 150.

V.

But little need be added. It has been shown that this Court unquestionably has jurisdiction. It has been shown that the statute enacted by the State of Kansas which we have been considering was inherently in conflict with the Constitution of the United States, and therefore void, as being an unwarranted interference with interstate commerce. It has been shown also that even if such statute had not been in itself—as an unwarranted interference with and burden on interstate commerce—beyond the power of the State to enact, it is certainly void as being inconsistent with the Federal system for the regulation of interstate cattle shipments created by the Act of Congress of May 9, 1884, and the national quaran-

tine rules framed by the Department of Agriculture in pursuance thereof. It has been shown further that no liability could attach to the plaintiff in error, either under the Federal enactments, or at common law, on account of the carriage by it of the cattle whose alleged diseased condition gave rise to this case. The important Federal question involved having therefore been incorrectly decided by the State court, and there being no other ground on which the judgment of that court can be supported, Federal or non-Federal, such judgment must in the interests of justice be reversed by this Court in the exercise of the jurisdiction conferred upon it by the Judiciary Act. The insinuation of counsel for defendants in error in their brief that the writ of error in this case was sued out merely for delay is, to say the least, totally unjustified. Railroad companies, as well as other persons, are entitled to the most careful and scrupulous adjudication of their rights, and while the defendants in error may have suffered harm and damages as their counsel claim, they are certainly not entitled to have those damages paid by one whose course has been throughout wholly innocent and blameless. It is of the highest importance that the law on this subject should be finally settled, and that the plaintiff in error and all other railroad companies should know what their duties are and whether they are to obey what has always been thought the paramount authority of the Federal Government, or the particular statutes and often conflicting enactments of the various States. We submit that the supremacy of Federal legislation on matters pertaining to interstate commerce should be asserted by this Court, and that the judgment of the Supreme Court of Kansas should therefore be reversed and the case remanded to that court, with instructions to dismiss the amended petition and cross petitions and to take no further proceedings.

SIMON STERNE,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 268.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES HABER ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Memoranda of Counsel for Plaintiff in Error Touching R. R. Co. vs. Husen, 95 U. S., 465, and Kimmish vs. Ball, 129 U. S., 217.

In the Husen case, 95 U. S., 465, where the Missouri-Texas fever statute was declared unconstitutional, the original record, which we have examined, shows that the complaint averred that all Texas cattle brought north during the period of the year covered by the statute were liable

to communicate Texas fever to the domestic cattle, and we think the record fairly shows that the testimony supported this allegation. (See vol. 5, Tr. of R. S. 1877, p. 4630.)

The Missouri supreme court had upheld the law on the ground that all Texas cattle were liable to communicate the disease.

The Illinois supreme court had, prior to the decision of this court in the Husen case, upheld the statute of Illinois similar to the Missouri statute on the same ground.

Therefore our contention is that the Husen case broadly denies the power of the State to forbid the transportation of cattle capable of communicating disease from one State into or through another State, and to now sustain the constitutionality of the Kansas statute will be to practically overrule the Husen case.

We have also examined the original record in Kimmish *vs.* Ball, 129 U. S., 217. It appears that the petition in that case claimed to recover under both sections, viz., 4058 and 4059, of the Iowa Code. The defendant demurred to the petition on the ground that both sections were violative of the commerce clause of the Constitution. The demurrer was sustained, but as the judges were divided in opinion as to the constitutionality of the second section (4059), the case was certified to this court on that question alone.

It therefore irresistibly appears that both judges of the court below (Love and Shiras) concurred in the unconstitutionality of the first section (4058). (See vol. 19, Tr. of R. S., p. 18391.)

It cannot be seriously doubted that the first section of the Iowa law, in so far as it prohibited the conveyance by a public carrier of any Texas cattle into the State, was

unconstitutional for the reasons given in the Husen case. The language of the Iowa law in the first section and the Missouri statute involved in the Husen case were substantially the same.

The Kansas supreme court in the case at bar says Kimmish *vs.* Ball controls this case and authoritatively affirms the validity of the Kansas statute; and counsel for defendants in error contend in their briefs and oral arguments that the Husen case is not controlling, and quote what was said of the Husen case in the opinion of Kimmish *vs.* Ball.

Our purpose in this short additional brief is to impress upon this court the importance of determining what was decided in the Husen case from its own record and opinion. It is not safe to ascertain from Kimmish *vs.* Ball what was decided in the Husen case, for the opinion in the Kimmish case fails to state the broad grounds on which the Husen case was decided.

Time has demonstrated as true what was contended by counsel for the constitutionality of the Missouri statute and what was decided by the supreme courts of Missouri and Illinois prior to the decision by this court of the Husen case, that all Texas cattle coming from within certain districts during certain periods of the year are liable to communicate Texas fever to domestic cattle.

What has been done by this court is more important than what may have been casually said in some particular opinion.

In the Husen case a statute of Missouri for its unconstitutionality was swept away on a principle subsequently followed by the Missouri and Illinois supreme courts, viz., that the public carrier, acting only as an agency of inter-

state commerce, could not be prohibited or unreasonably restricted by State legislation in the carriage of merchandise from one State to another.

The first question in the case at bar, therefore is, Is the Husen case to be dwarfed, limited, and narrowed till practically a great landmark in constitutional law disappears?

It will be a sad day for that doctrine of constitutional law, which upholds the exclusive power of Congress to regulate interstate commerce national in character, when the Husen case shall not be upheld in all its length and breadth.

JAMES HAGERMAN and
T. N. SEDGWICK,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 268.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES HABER ET AL., DEFENDANTS IN ERROR.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Missouri, Kansas & Texas Railway Company, plaintiff in error herein, respectfully presents its petition for rehearing, and submits the following reasons why its prayer should be granted: —

I.

Our first contention in support of this petition is that the court in its opinion has overlooked the legal proposition that the act of Congress on which the railway company relied for its defense does regulate and govern the civil

liability of the railway company. In the 10th specification of error in our original brief, page 68, we claimed that the civil liability, if any, of the railway company arose under the act of Congress.

That assignment of error reads as follows: —

> "10. The said Supreme Court erred in not holding that the defendant company was, and could, in no way be held responsible for the act of transportation of the Texas cattle in question from Texas to Kansas, and that its liability therefor, if any, could only be a liability arising under the laws of the United States."

At page 50 of our original brief we stated among the reasons why the railway company could not be held liable: —

> "4. Because even if the Texas cattle in question "were capable of communicating the Texas or Spanish "fever to the Kansas cattle and the defendant com- "pany knew that fact (which it did not as conclusively "shown by the special findings of the jury), then the "liability of the defendant company, if any, could be "based only on the Federal law and not on the State "law. If, as in the opinion of the Supreme Court of "Kansas (Tr. 289–297) intimated, the defendant vio- "lated Sec. 6 of the act of Congress of May 29th, "1884, in transporting the Texas cattle, then the "defendant could be sued therefor only under the "Federal statute, and if such suit had been brought "the defendant would have had the right to remove "the case to the United States Circuit Court of Kansas "and had it there tried according to the methods of "procedure of that court. It is a universal and fun- "damental rule of pleading in Kansas, as elsewhere, "that when a suit is founded upon a statute the same

"must be plead. The claimants have never sued on "the Federal statute, but have sued alone on the "Kansas statute."

See also our original brief, pp. 91 to 101, specially pp. 94, 95 and 96, where we show that the act of Congress covers the entire subject of transporting cattle, including civil liability, from one State to another.

The court seems to have overlooked the foregoing assignment and the foregoing proposition contained in our brief touching it, and to have assumed that the act of Congress in no way dealt with the question of civil liability, and therefore the State of Kansas was left free to deal with that question. We have read and reread with painstaking care the opinion of this court, and we understand that it distinctly concedes that Congress had the right to legislate touching the civil liability and if it had in fact so legislated that any legislation of the State upon that subject would have to give way as in conflict with the act of Congress. We certainly do not understand the court as expressing any serious doubt upon the proposition that it was competent for Congress to legislate upon the subject of civil liability.

The Supreme Court of Kansas, in its opinion (Tr., p. 292) after quoting Sec. 6 of the act of Congress, said:—

"But the first clause of Sec. 6 expressly prohibits "any railroad company from transporting from one "State or Territory to another any live stock affected "with any communicable disease. The last clause of "this section expressly recognizes the existence of "such a disease as splenetic or Texas fever, but "exempts cattle affected with it from the provisions "of the act when being transported by rail to market

" for slaughter when the same are unloaded only for
" the purpose of feeding and watering on the way.
" The grant of permission to transport to market for
" slaughter emphasizes the prohibition contained in
" the preceding portion of the section against the
" transportation for other purposes of cattle capable
" of communicating disease. It clearly was not the
" purpose of Congress to authorize cattle capable
" of imparting Texas fever to be brought into Kansas
" and communicate the disease to the domestic herds
" of this State. On the other hand, this section
" expressly prohibits the company from doing so."

When we prepared our original brief for this court we knew that counsel for the claimants had in the Supreme Court of Kansas claimed that the judgments of the State District court should be affirmed because the railway company was civilly liable under the act of Congress as well as that of the State, and we anticipated that they would make the same claim here, and therefore we asserted in our original brief, though not alluded to in the oral argument, that the judgment of the Supreme Court of Kansas could only be upheld as such under the Kansas statute, for that statute was alone sued upon. At no stage of the case did counsel for claimants assert that Congress could not regulate the question of civil liability and of course we may assume that this court will not allow the case at bar to pass off upon the question of the denial of the right of Congress to make such regulation. The statute of Kansas sued on, as construed first by the claimants, next by the District Court of Kansas, and then by the Supreme Court of Kansas, and which construction is upheld by this court, imposes a liability upon the railway company for bringing cattle into the State if it knew, or by due diligence could have known, that the cattle were capable of

communicating the Texas fever, though the fever was not in fact communicated until long after the cattle had passed at their railroad destination from the railway company to their owners, and had been driven by their owners across Lyon County into Chase County, Kansas. The liability of the railroad company was therefore based under the Kansas law on the company's act of transporting the cattle across the State line of Kansas, and not for transporting them into Chase county, nor for the communication of the disease while they were in the possession of the railroad company. The opinion of this court assumes that the act of Congress related only to a criminal liability on the part of the railroad company for knowingly bringing the cattle into the State, and did not cover a civil liability on the part of the railroad company. As we read the opinion, we can but conclude that the decision of this court would have been different if the court had understood that the act of Congress regulated the question of civil liability. Our distinct proposition in this part of our petition upon which we ask a rehearing is that this court has inadvertently overlooked the proper construction of Sec. 6 of the act of Congress which, as we claim, created a civil liability, and that the claimants could have based their action upon that section, and have recovered their losses if they had shown by proper averments and proofs that it had been violated to their damage.

That this court acted under an erroneous impression that Sec. 6 construed in the light of other portions of the act of Congress created no civil liability is shown by the following extract from the printed opinion before us, page 6 :—

> " Whether a corporation transporting, or a person
> " causing to be transported, from one State to another,
> " cattle of the class specified in the Kansas statute

"should be liable in a civil action for any damages "sustained by the owners of domestic cattle by reason "of the introduction into their State of such diseased "cattle is a subject about which the Animal Industry "act did not make any provision."

In a word, this court decides that the Federal act did not fix any civil liability upon carriers for transporting diseased cattle, but that that liability was left, as before the passage of the act, to be determined under general principles of law or under some State enactment.

Section 6 of the Federal act prescribes:—

"That no railroad company within the United "States or the owners or masters of any steam or "sailing vessel or boat, shall receive for transport- "ation or transport from one State or Territory to "another, or from any State into the District of Co- "lumbia, or from the District into any State, any "live stock affected with any contagious, infectious "or communicable disease, and especially the disease "known as pleuro pneumonia."

While Section 7 of the act in express words only prescribes a penalty for the violation of Section 6, yet it cannot be doubted under the well-settled rule supported by an overwhelming weight of authority that a civil cause of action at the same time arises in favor of any one who can show himself damaged by reason of a railroad company violating Section 6 in the transportation of cattle therein prohibited, and being exactly the same liability for the same kind of cattle affected by the same kind of disease covered by the Kansas act, and in which a civil liability is prescribed in so many words. While the Federal act does

not prescribe a civil liability in words, yet in law it does. The fact that there is a penalty provided for the violation of the statute, payable to the United States, and that a civil liability is not in express words mentioned, does not prevent those who have been specially injured by its violation from recovering damages therefor. "For where a duty imposed," says Mr. Cooley in his work on Torts, First Edition, page 654, "is obviously meant to be a public duty, and a penalty for its violation is made payable to the State or to an informer, the right of an individual injured to maintain an action on the case for breach of the duty owing to him is unquestioned." And Shearman and Redfield, in their work on Negligence, Sec. 13, say:—

> "The violation of a statute of the United States may be made the basis for an action of negligence in a State court. These principles apply not only where a statute or ordinance discloses that persons violating it shall be liable for any damages sustained by reason of its breach, *but also where it contains no such provisions, and simply imposes a penalty by way of fine or otherwise for its disobedience.*"

In support of this text, the learned authors cite Bishop on Non-contract Law, Sec. 126; Comyn Dig. Action on Statute F.; Hayes *v.* Railroad Co., 111 U. S. 228.

Section 4386 of the Revised Statutes of the United States provides that:—

> "No railroad company within the United States, "whose road forms any part of a line of road over "which cattle, sheep, swine, or other animals are con- "veyed from one State to another, or the owners or "masters of steam, sailing, or other vessels carrying "or transporting cattle, sheep, swine, or other animals "from one State to another, shall confine the same in

"cars, boats, or vessels of any description, for a "longer period than twenty-eight consecutive hours, "without unloading the same for rest, water, and "feeding, for a period of at least five consecutive "hours, unless prevented from so unloading by storm "or other accidental causes. In estimating such con- "finement the time during which the animals have "been confined without such rest on connecting roads "from which they are received shall be included, it "being the intent of this section to prohibit their con- "tinuous confinement beyond the period of twenty- "eight hours, except upon contingencies hereinbefore stated."

And section 4388 provides a penalty for failure to comply with foregoing section of from $100 to $500.

And while no civil liability is fixed for the violation of this statute, it has been repeatedly held that a cause of action arises upon a violation of the statute in favor of anyone damaged thereby.

Chesapeake & Ohio Ry. *v.* American Exchange Bank, 23 S. E. Rep. 935 (Supreme Court of Appeals of Va.);

Railway Co. *v.* Haggie, 86 Georgia, 210 (*s. c.* 12 S. E. Rep. 363);

See to same general effect Carroll *v.* Railroad Company, 58 N. Y. 126;

Railway Co. *v.* Daggett, 28 S. W. Rep. 524 (Supreme Court of Texas).

So in the case of Grey *v.* Trade Co., 55 Alabama, 387, it was held that where a cargo of cotton was received by a carrier for transportation and was destroyed by fire on a boat, the carrier could not avail himself of an exemption from liability for loss by fire if he neglected to protect the

cotton on the deck of the vessel by a complete and suitable cover of canvas or other suitable material to prevent ignition by sparks as required under penalty by an act of Congress, but which gave no civil action in express terms.

In Hilliard on the Law of Torts, Sec. 26 (4th Edition), it is said:—

> "An unlawful act may be committed in violation of some express statute, and this class of torts requires special notice. It is said where any law requires one to do any act for the benefit of another, or to forbear the doing of that which may be an injury to another, though no action be given in express terms, by the law of the omission or commission, the general rule of law in all such cases is that the party so injured shall have an action." Citing

Ashby *v.* White, 2 Ld. Raym. 953, per Lord Holt, C. J.; 6th Exch. 752; 7th Exch. 460;
Burson *v.* Cowles, 25 Cal. 535.

Ray in his work on Negligence of Imposed Duties, page 662, says:—

> "It is a general rule that when one who owes another a duty, whether such duty is one assumed by a voluntary contract or imposed by a statute, a breach of such duty gives a cause of action. Duty and right are correlative, and the duty being imposed the right to have it performed results to the person interested." Citing

Hover *v.* Barkoff, 44 N. Y. 113;
Jetter *v.* N. Y. & Hudson R. R. Co., 2 Abb. App. Dec. 458;
Heeney *v.* Sprague, 11 R. I. 456;
Couch *v.* Steel, 3 L. & E. L. and B. L. 402;
Willy *v.* Mulledy, 78 N. Y. 310.

In Comyn's Digest, title Action upon Statute, F., it is stated as the rule that:—

> "In every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the said law."

Upon this question, in the leading case of Hayes *v.* Mich. Central Ry. Co., 111 U. S. 228, where this court considered the question of liability of a railroad company for failing to fence its road as required by statute and when no right to damages was expressly given, this court said:—

> "It is said, however, that it does not follow that whenever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed; and we are referred to the case of Atkinson *v.* Newcastle Water Works Co., L. R. 2 Exch. Div. 441, as authority for that proposition, qualifying as it does the broad doctrine stated by Lord Campbell in Couch *v.* Steel, 3 E. & B. 402. But accepting the more limited doctrine admitted in the language of Lord Cairns in the case cited, that whether such an action can be maintained must depend on the "purview of the legislature in the particular statute, and the language which they have there employed," we think the right to sue, under the circumstances of the present case, clearly within its limits. In the analogous case of fences required by the statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to

persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery. "The nature of the duty," said Judge Cooley in Taylor *v.* L. S. & M. S. R. Company, 45 Mich. 74, "and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their special benefit." (See also, Railroad Company *v.* Terhune, 50 Ill. 151; Schmidt *v.* The Milwaukee & St. Paul Railway Company, 23 Wis. 186; Siemers *v.* Eisen, 54 Cal. 418; Galena & Chicago Union Railroad Company *v.* Loomis, 13 Ill. 548; O. & M. Railroad Company *v.* McClelland, 25 Ill. 140; St. L. V. & T. H. Railroad Company *v.* Dunn, 78 Ill. 197; Massoth *v.* Delaware & Hudson Canal Company, 64 N. Y. 521; B. & O. Railroad Company *v.* State, 29 Md. 252; Pollock *v.* Eastern Railroad Company, 124 Mass. 158; Cooley on Torts, 657.")

In A. T. & S. F. Ry. *v* Reesman, Circuit Court of Appeals, 8th Circuit, 60 Fed. Rep. 370, it was held (following Hayes *v.* R. R. Co., *supra*), Justice Brewer delivering the opinion: "When through the failure of a railroad company as required by Revised Statutes of Missouri, 1889, Sec. 2611, an animal gets on the track causing derailment of the train an employee on the train who is injured by the accident is entitled to sue the company since such statutes are designed to protect persons on trains as well as cattle owners." The Missouri statute in question did not give any civil action to trainmen, but gave such action to the cattle owner. See to same effect Donnegan *v.* Erhardte, 119 N. Y. 468. See also Quackenbush *v.* Railroad Co., 62 Wis. 411.

In Couch *v.* Steel, 3 E. & B. 402, a shipowner having neglected a statutory duty of keeping on board a supply of medicine, it was held that a sailor whose health had been injured for want of such medicines could maintain his action though the statute did not in express terms give an action for damages.

The preamble of the act 32 & 33 Vict. c. 70 known as the Contagious Disease Act of 1869, explained its purpose:—

> "Whereas it is expedient to confer on her Majesty's "most honorable Privy Council powers to take meas- "ures as may appear from time to time necessary to "prevent the introduction into Great Britain of con- "tagious or infectious diseases among cattle, sheep "and other animals by prohibiting or regulating the "importation of foreign animals and it is further expe- "dient to provide against the spreading of diseases in "Great Britain."

In Gorris and another *v.* Scott, L. R. 9 Exc. 125 (1874), where plaintiff sued on that act for loss of some sheep which were washed overboard by reason of an alleged failure to comply with certain regulations contained in the act and other regulations of the Privy Council made in the exercise of power vested in them by the act, it was held by Kelly, C. B., Pigott, B., Pollock, B., and Amphlett, B., in concurring opinions, that the act was not to protect against disasters at sea but that its object and purpose was "to prevent animals in a state of infectious disease from communicating it to other animals with which they might come in contact," and it was admitted that an action would lie thereunder by any one damaged by the dissemination of disease as a result of a violation of the statute, though it

only provided a penalty and did not in words give a civil action.

In Bouvier's Law Dictionary, title Torts, it is said: —

> "In general it may be said, that whenever the law creates a right, the violation of such right will be a tort; and whenever the law creates a duty, the breach of such duty, coupled with consequent damage, will be a tort also. This applies not only to the common law, but also to such rights and duties as may be created by statute."

So we undertake to say that both the Federal act and the Kansas act prescribe a civil liability, and as to the rule of civil liability there is a clear conflict; the Kansas act providing that the carrier shall be *prima facie* liable if the cattle come from south of the 37th parallel, while the Federal act *ex vi termini*, only subjects the carrier to an action for damages when it knowingly violates the act, and it is manifestly true that should a party sue for damages under the Federal act, as we have seen he undoubtedly could, the carrier could plead its compliance with the quarantine and the rules and regulations prescribed by the Bureau as a defense, or at least as evidence of its not knowing their diseased condition. The suit alleging the violation of the act of Congress and consequent damage would be one arising under the constitution and laws of the United States and could be brought originally in the Federal court, or if brought first in the State court removed to the Federal court.

Belden *v.* Chase, 150 U. S. 674;
Lowry *v.* C. B. & Q. R. Co., 46 Fed. R. 83;
In re Lennon, 166 U. S. 548.

What object and purpose did Congress have in view in prohibiting carriers from transporting Texas cattle affected with the communicable disease of Texas fever except for immediate slaughter from one State to another? Every word and sentence of the act from beginning to end shows that it was to prevent the spread of the disease of Texas fever, and the consequent ravages which it would have upon the domestic cattle of the various States, including the State of Kansas. The prohibitions of the Federal statute were therefore for the protection and benefit of the owners of domestic cattle. If such was the object and purpose of the Federal statute, then all of the well-considered authorities which we have cited, without a dissenting voice, hold that out of the violation of such a statute arises a civil liability in favor of the owners of domestic cattle. Is this court in view of the opinion which it evidently holds of the importance of legislation touching the subject of the spread of disease among cattle, content to hold, as it does in the opinion in this case, that no civil liability arises from the act of Congress in question? Is it not true, in the light of the authorities which we have cited, that if the railroad companies of this country carry cattle into any of the States or Territories of the Union affected with the communicable disease of Texas fever, and spread the ravages of that disease among the domestic herds in violation of the Federal statute, that the owners of such cattle have the right to a civil action for damages against such companies based on the prohibitions of that statute? If such be the true construction of the act of Congress, then is it competent for the States to burden interstate commerce with an additional or the same liability under State laws? If the opinion of this court is to stand, and it is to be held that no civil liability arises under the Federal statute, does it not strip this Congressional legislation of the protection and benefit which it was meant to

afford to the owners of domestic herds? The case at bar was tried by the courts below on the theory that the Federal statute, the rules and regulations of the Department of Agriculture and the quarantine line established by the Federal authorities had no bearing upon the question of civil liability either as evidence or as a defense, and the case has been decided upon the theory that no civil liability arose from the Federal statute, and we trust that what we have hereinbefore said will impress the court with the importance of having that question thoroughly argued, which can only be done if our petition for rehearing is granted.

II.

We earnestly ask a rehearing on the further ground that this court, in its opinion, omitted to pass upon three certain assignments or specifications of error (Nos. 3, 4 and 11), asserted and urged in the original brief of plaintiff in error. These alleged errors relate to the exclusion of testimony offered at the trial by the defendant railway company, and are as follows:—

> "3. The Supreme Court erred in refusing to reverse "the judgments of the said District Court for its "refusal to admit in evidence the regulations of the "Department of Agriculture of the United States, "which are in words and figures as follows:— "

(Here follow the regulations concerning cattle transportation of the Department of Agriculture, dated February 26, 1892, and which are set out in full in the assignment of error.)

See pages 51 to 56 of appellant's original brief.

"4. The Supreme Court erred in refusing to reverse "the judgments of said District Court for its refusal "to admit the testimony of A. T. Drew and M. "Sweeney to the effect that the defendant railway "company in the shipment of the Texas cattle in "question conformed to the foregoing regulations of "the Department of Agriculture."

See appellant's original brief, page 56.
See Transcript of Record, pp. 204–231.

"11. The Supreme Court erred in refusing to "reverse the judgments of said District Court for its "refusal to admit in evidence the two permits of the "Live Stock Sanitary Commission of Kansas signed "by order of said commission, by Albert Dean, In-"spector, who was also Live Stock Inspector for the "Bureau of Animal Industry of the Department of "Agriculture of the United States, the said permits "being Exhibits I and J to the answer of the defend-"ant railway company (Tr. 29), and being in words "and figures as follows, to wit:—

EXHIBIT "I."

"State of Kansas:

"CATTLE INSPECTOR'S OFFICE,
"KANSAS CITY, KANSAS, April 24th, 1892.

"The Missouri, Kansas & Texas Railroad Company "is hereby permitted to ship to Hartford, Kansas, "1,501 head of cattle, consigned to Hosier Brothers.

"Said cattle are shown by affidavit in this office to "have been from Pecos county, Texas. These cattle "are branded t $\overline{3}$ and other brands.

"By order of Live Stock Sanitary Commission.

"ALBERT DEAN, Inspector."

EXHIBIT "J."

"State of Kansas:—

"CATTLE INSPECTOR'S OFFICE,

"KANSAS CITY, KANSAS, June 3rd, 1892.

"The Missouri, Kansas & Texas Railroad Company "is hereby permitted to ship to Hartford, Kansas, "500 head of cattle, so consigned to Hosier Brothers.

"Said cattle are shown by affidavit in this office to "have been from Pecos county, Texas. These cattle "are branded t $\overline{3}$ and other brands.

"By order of Live Stock Sanitary Commission.

"ALBERT DEAN, Inspector."

See original brief of appellant, pages 68–69.
See Transcript of Record, pp. 231–2–4.

Assuming for the purposes of this part of our petition for rehearing that the Kansas statute, rightly construed, imposed the extraordinary civil liability upon the defendant for bringing cattle into the State which it knew or might by the exercise of due care have known to have been capable of communicating disease, though the disease was communicated after the cattle had passed from the possession of the railway company to that of their owners, and assuming, further, that the statute as thus construed is not in conflict with either the constitution or the laws of the United States, we earnestly contend that upon the questions of fact which were submitted to the jury touching the company's knowledge or negligence in not knowing the dangerous condition of the cattle that the defendant was entitled to have had considered by the jury the rules and regulations of the Department of Agriculture establishing the United States quarantine line and the method of transporting Texas cattle, therein prescribed by the Federal authorities, and also the permits issued by the inspector of

the Department of Agriculture of the United States, who was also the State inspector, permitting the company to bring these particular cattle into the State, and also the testimony of Sweeney and Drew, two of the railroad officers, to the effect that in the movement of these cattle the rules and regulations of the Department of Agriculture were in all respects observed. We specially claimed in our brief that the action of the court in ruling out each of these items of evidence was erroneous. Can there by any doubt that this evidence should have gone to the jury upon the question of the defendant's knowledge, or want of care in not knowing the dangerous condition of the cattle? The quarantine line of the Federal government, the rules and regulations of the Agricultural Department, the written permission of the State inspector, who was also the Federal inspector, were all part of the *res gestæ* of the transportation of the cattle, and showed the circumstances, surroundings and conditions under which they were moved. The Federal statutes authorized the Federal authorities to receive the co-operation of the State authorities, and the State statute authorized the State officers to co-operate with the Federal authorities. See Section 3 of the National Quarantine Law (p. 3 of opinion in this case), and Section 6826 of the State Law, pages 3 and 15 of appellant's original brief, and page 2 of the opinion of this court.

We ask the court to picture in its mind the trial of this case as it took place in the Lyon County District Court. There will be seen the jury, opposing counsel, the numerous claimants, and the ultimate questions to be decided by the jury — the railroad company's knowledge of or negligence in not knowing the dangerous condition of the cattle. How different does the case stand as it shall finally go to the jury, with or without this testimony which was excluded by the court. What stronger testimony could have been introduced showing the company did not know the dan-

gerous condition of the cattle or that it was not negligent in failing to ascertain their dangerous condition, than that the cattle came from a section where the health officers of the United States, acting under laws of Congress and rules of the Department of Agriculture thereby authorized, had said the fever did not exist, and from which cattle could be safely transported, and that they were moved under the rules and regulations of the Federal authorities and under the express permission of the State and Federal inspector. With this testimony excluded the case, as submitted to the jury, rested upon the *prima facie* proof prescribed by the Kansas statute, that the cattle having communicated the disease it must be presumed, in the absence of evidence to the contrary, that the defendant had full knowledge and notice of their capacity to communicate the disease. We undertake to say that any experienced fair-minded lawyer can only conclude that upon the state of the record, with the before enumerated testimony excluded, there would be no other result than a verdict for the claimants. With this testimony in evidence and before the jury, notwithstanding other disadvantages which need not be mentioned, but which will readily occur, under which the railroad company in that kind of a contest would labor, there would be a fair hope of securing a verdict from the jury that the company either had no actual knowledge of the condition of the cattle, or were not negligent in failing to know their condition. If the Federal and State inspectors, posted along the line of the railway to look out for Texas cattle capable of communicating the Texas fever, thought and concluded and decided, as part of the *res gestae* of the movement of these cattle, that they were not capable of communicating the disease, how strong the argument that the railroad company had no guilty knowledge or were not negligent in failing to have it. If the expert doctors, provided by both State and Federal

authority, officially ascertained and told the company that the cattle were not dangerous, was that not high evidence respecting the knowledge or negligence on the part of the company? The errors, therefore, of the Kansas courts in excluding this testimony are most manifest, and the only question remains as to whether the errors were of such a nature that we can avail ourselves of them in this court. This court in the opinion announced, entirely overlooked the points raised by us as to this testimony. We claim and will support by authority, to which we will immediately refer, that if the Federal quarantine and the rules and regulations of the Bureau of Agriculture, and the movement of the cattle in compliance therewith and the permission of the Federal and State inspector, had the effect as evidence in the railroad company's favor to support a material issue involved in the case, that we are entitled to the benefit of it as a Federal right, although it may not have been complete justification of the acts for which the railroad company is sued. By asking the court to consider whether the exclusion of this testimony was error we are not asking it to pass upon the facts and therefore the concluding sentence of the opinion that it cannot review the facts has no application and does not answer our contention.

If this testimony had been admitted and notwithstanding its probative force, the jury had still found that the railway company knew, or ought to have known, the dangerous condition of the cattle, it might well be that this court would not review the finding of facts of the jury though contrary to the weight of the evidence. The admissibility of this testimony, however, presents a different question, and one that a common law or Federal appellate court can and should determine.

Therefore, in again pressing these errors to the attention of this court for its serious consideration, we are not un-

mindful of the fact that a writ of error only brings up for review and determination questions of law, and that the court will not review the evidence "in order" as was said by Mr. Justice Story, "to ascertain whether the judge (or jury) rightly interpreted the evidence or drew right conclusions from it" (Hyde *v.* Booraem, 16 Pet. 169), nor have we overlooked the concluding paragraph of the court's opinion in the case at bar. We are not asking the court to review the verdict and findings of the jury from the *evidence offered and given to the jury*, but are asking this court to review and revise the action of the Supreme Court of Kansas in approving the act of the trial judge in excluding *from the* jury, competent and material evidence. In the case of Belden *v.* Chase, 150 U. S. 674, this court said:—

> "This court has jurisdiction to review the judgment "of the court of a State in an action at common law "to recover damages caused by the collision of two "steamers navigating the inland waters over which "the United States have admiralty jurisdiction, "*when* that judgment denies rights claimed by "the plaintiff in error under rules established by "statutes of the United States for preventing col- "lisions or rights regarding the application of such "rules."

There, a collision occurred on the Hudson River in the State of New York. Action for damages was brought in the State court against the owner of the yacht Yosemite "for so negligently navigating the yacht as to run down and sink the steamboat Vanderbilt" of plaintiff. On the part of the defendant in error it was contended that this court had no jurisdiction as the plaintiff in error had not shown he had any right under a United States statute which had been decided against him, and that the yacht sailing

on inland waters was controlled by the New York statute and local law and therefore no Federal statute was involved. On the other hand the plaintiff in error, the owner of the yacht, claimed that he was navigating his yacht agreeable to the rules prescribed by the Federal statute and agreeable to a code of rules prescribed by a Federal Board of Supervising Inspectors. There was a conflict between the State regulations and the Federal regulations. The plaintiff in error relied on his compliance with the Federal regulations, and asked the court to instruct accordingly, which the court refused to do. This court held that this raised a Federal question entitling the plaintiff in error to a review here, and further held that the rules prescribed by the Federal Supervising Inspectors had all the force of an act of Congress. Could there be a case more in point as showing the error of the trial court in excluding the testimony of which we complain? It is not a question of weighing evidence or reviewing the jury's conclusions upon the evidence before them, but of the court's decision against the competency and admissibility of Federal testimony. In Dower v. Richards, 151 U. S. 658, this distinction is clearly drawn by Mr. Justice Gray, for it is there said:—

> "When, indeed, the question decided by the State
> "court is not merely of the weight of evidence or
> "sufficiency of the evidence to prove a fact, *but* of the
> "competency and legal effect of the evidence as bear-
> "upon a question of Federal law, the decision may be
> "reviewed here."

And in Republican River Bridge Co. *v.* Kansas Pacific R. R. Co., 92 U. S. 315, Mr. Justice Miller said:—

> "In chancery cases or any other class of cases
> "where all the evidence becomes part of the record in

In Hall *v.* Jordan, 15 Wall. 393, it was held that the admission of an unstamped deed could be assigned as error in this court in a common law case brought from State Supreme Court.

"the highest court of the State, the same record being "brought here, this court can review the decision of "that court on both the law and the fact, *so far as* "*may be necessary* to determine the validity of the "right set up under the act of Congress."

As indicated in the beginning of this part of our petition, we need not here claim that the excluded testimony constituted a complete *defense* to the action, but all we need claim is that it tended to show that the company was justified in acting on the assumption that the Federal government would not mislead it as to the places and territories where infectious or communicable diseases existed, and that it could rely on such regulations and quarantine lines as a source of information provided by Federal law in conducting its business as a common carrier. Suppose an individual is sued for negligently communicating smallpox to his neighbor. Cannot the individual show in defense, if such is the fact, that he consulted doctors learned in medicine and was advised that he did not have smallpox? If the patient was received from Federal quarantine officials, who, in the course of their official duty, examined him and pronounced him not infected, could not the party sued offer those facts as tending to prove that he did not know the patient was diseased? Now in the case at bar the government of the United States, recognizing the importance of the question, established a special bureau to deal with this queer disease. The act creating the bureau provided for the appointment of a "competent veterinary surgeon" as the head of that bureau, "whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious and communicable diseases among them and the means for the prevention and cure of the same and

to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country, and the Commissioner of Agriculture is hereby authorized to employ a force sufficient for the purpose not to exceed twenty persons at any one time" and then the Commissioner of Agriculture is directed to "prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases," and it is made the duty of the Commissioner "to notify in writing the proper officials or agents of any railroad, steamboat or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select of the existence of said contagion, and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district who shall knowingly violate the provisions of section six of this act shall be guilty of a misdemeanor." Section six of the Federal act prohibits any railroad from transporting "any live stock affected with any contagious, infectious or communicable disease," and construed in the light of section seven, as we claim, renders the party transporting such cattle civilly as well as crimi ally liable when the carrier knows the cattle are diseased. The Federal government undertook to locate this disease and advise the railroads as to where it existed and where it did not exist, and the railroads are required, under penalties prescribed and prohibitions contained, to act conformably to the Federal goverment's advices and regulations. If the railroads act in violation of such advice and regulations, such violations may be used in evidence against the railroads in actions for damages. If the railroads comply with them, can they not show such compliance as evidence in their favor?

The State court in excluding this evidence, necessarily construed the Federal statute, and construed it against the contention of the plaintiff in error. When this evidence was offered, the court, of course, looked at the act of Congress and construed the act as not giving to the regulations and quarantine line any effect as contended for by the plaintiff in error — in fact held that the act of Congress and the regulations of the Department of Agriculture in conformity therewith, had no bearing at all upon the issues or any issue in the case.

The opinion of this court holds that the proper construction of the act and regulations is for the Federal courts and that they are not a complete defense in an action. We now ask this court to say if they are not a *partial* defense.

In other words, we ask this court to review the State court's construction of the legal effect to be given to the act of Congress and these regulations.

This case has not been rightfully tried. It will not be rightfully tried until this court lays down rules for the guidance of the Kansas courts as to the Federal rights of the company and their bearing on the issues. If the Kansas statute is constitutional still the act of Congress and the Federal quarantine line, and the Federal regulations, and the permission of the Federal inspector have important bearings on the determination of the controverted questions of fact, namely, the railway company's knowledge or negligence in not knowing of the dangerous condition of the cattle, and unless the Kansas courts permit these items of Federal evidence to be shown the railway company will be deprived of a right, privilege and immunity accorded to it under the Federal laws. The claim we now make as to this excluded testimony not having been yet decided by this court, we submit we should have an opportunity to be heard on this branch of the case.

III.

1st. The question involved in this case was as to the constitutionality of the provisions of the statute of Kansas, being Chapter 191 of the Laws of 1885 of that State as amended by Chapter 201 of the laws of 1891, enacted for the alleged purpose of protecting Kansas cattle against contagious diseases, and more especially against Texas fever. In the opinion of the court as delivered by Mr. Justice Harlan, it is stated that if the statute in question had been as oppressive as the plaintiff in error claimed it to be, the court might have declared the statute invalid; but that it was unnecessary to pass upon that question because the theory on which the plaintiff in the State court had framed his complaint and the instructions of the trial court to the jury showed that there was no such oppressive result caused by the statute as was charged. The opinion says:—

> "It is suggested that the statute is so drawn that the railway company would be liable, even if it acted in good faith, and had no reason to believe, after the exercise of the utmost diligence, that the cattle it received for transportation were liable to impart or were capable of communicating the fever named in the statute. If the statute were thus interpreted, it might be — though upon that point we express no opinion — that it would be so oppressive in its necessary operation as to be deemed a burden upon the transportation of all cattle from Texas, whether diseased or not, and for that reason be liable to the same objection urged against the statute involved in *Railroad Co.* v. *Husen*. But we do not so construe the statute."

The opinion goes on to state that the trial court had instructed the jury that the proof must indicate knowledge

of the dangerous character of the cattle on the part of the railway company or at least such circumstances as should put the railway company on its guard, and this court seemed to think that such instruction was sufficient to rebut the claim of plaintiff in error as to the oppressive nature of the statute, because it showed that under the construction given to the statute by the State court no such oppression was practiced.

It is respectfully submitted that the court ignored another portion of the trial court's charge to the jury which appears to us to controvert what the opinion of this court states to be the purport of the charge as a whole. The trial court did, it is true, instruct the jury that the proof must indicate knowledge of the dangerous character of the cattle on the part of the railway company or such circumstances as should put the railway company on its guard, but it also specifically drew the attention of the jury to the fact that under the statute the mere fact that the cattle came from south of the southern boundary line of Kansas between the first day of February and the first day of December was *prima facie* evidence that such cattle were capable of communicating Texas fever and that the railway company had full knowledge of the cattle's ability to impart such disease: —

> "The statute of this State makes the fact of bringing away cattle from south of the south line of Kansas between the first day of February and the first day of December *prima facie* evidence that such cattle were capable of communicating and liable to impart Texas splenic or Spanish fever, and that the person in charge of such cattle had full knowledge and notice of their ability to impart such disease to the native cattle."
>
> Paragraph 5th of Trial Court's charge to the jury, Transcript of Rec., p. 268.

The answers of the jury to the special questions propounded to them (Transcript of Rec., pp. 272–274) show conclusively that there was no proof whatever of any knowledge on the part of the railway company of the dangerous condition of the cattle, so that knowledge was only inferentially imputed to the plaintiff in error through the operation of the statute. It is submitted, therefore, that the claim of the plaintiff in error as to the oppressive character of the statute is thus fully supported, inasmuch as the judgment of the State court could not have been sustained either from the standpoint of the common law or of Federal enactments, unless knowledge of the dangerous condition of the cattle was shown. No such knowledge was shown in the case at bar, and it was only on account of the presumption of knowledge created by the statute that the judgment against the railway company was rendered.

The provision of the statute making the fact that the cattle came from south of the southern boundary line of Kansas *prima facie* evidence of their liability to communicate disease and of knowledge on the part of the person driving or shipping them, might find justification, as this court suggests, in the fact "that Texas cattle when brought northward during the spring and summer months often carry the germs of fever, or are often, though not always, infected with fever that may be communicated by them to domestic cattle," but only if such a construction were given to the statute by the Kansas courts as to allow the presumption created by the statute of knowledge of the dangerous condition of the cattle to be overcome by proof that the carrier had no such knowledge and had no cause to believe after making reasonable inquiry that the cattle were dangerous. The Kansas court did not so construe the statute. On the contrary, its charge to the jury shows that in its view the presumption of knowledge created by the statute was tantamount to a conclusive presumption as

it was impossible to prove a negative. For that was the situation in the case at bar. There was absolutely no evidence except the presumption created by the law produced that would tend to fix upon the railway company in any degree the charge that it knew that the cattle were dangerous. The United States regulations, if they had no effect otherwise, certainly excused the duty of special inquiry, as they allowed shipments all the year round from the point whence these cattle came. The answers of the jury show this, and the fact that the jury in spite of such answers rendered — under the instructions of the trial court as to the presumption created by the statute — a verdict against the plaintiff, shows that the plaintiff in error's charge that the statute is oppressive and confiscatory in its operation is part of the undeniable record in this case.

If the interpretation placed upon the statute by the Kansas court had been what this court stated it to be, namely, "that damages shall not be recovered if from all the evidence it appears that the defendant had no knowledge or notice that the cattle were of the kind forbidden by the statute to be brought into the State" — the statute might be a reasonable one. But the interpretation of the statute by the Kansas court being altogether different, and construing that statute in such a way that knowledge is imputed to the carrier despite practically positive evidence to the contrary, and making the carrier liable for whatever damage may accrue from the carelessness of the consignee or others wholly strangers to the carrier to whom the infected cattle were delivered or under whose control they incidentally came, we respectfully submit that the statute cannot be supported as a reasonable enactment designed to protect the property of the State, but is an oppressive burden on the carrier of an important article of interstate traffic and therefore deprives the carrier of his property without due process of law.

2nd. The Kansas statute sued on is not an inspection law. It does not even assume to be such, but is avowedly a penal statute creating both a criminal and civil liability. Were it an inspection law, it would at least recognize some difference between cattle actually afflicted with disease and cattle not so afflicted. This court, until the present case, has never conceded to the States any greater power than that of keeping out from their borders property actually proved to be dangerous, and has not in the past supported any State enactment which went further than to prohibit the importation of such property and provide safeguards at the expense of the State for the determination of whether any particular article of commerce was dangerous or not, and which may be a burden on interstate commerce but is one which must be borne in the interest of society. In the present case, however, it has supported a law which in its practical workings and under the construction given to it by the Kansas courts, puts upon the carrier of interstate commerce the burden which should be borne by the health authorities of the State. This cannot be called a statute only indirectly affecting interstate commerce therefore. It is in its result as direct and absolute an interference with interstate commerce as has been before this court in any case, practically going as far in that direction as the statute under consideration in the *Railroad Co.* v. *Husen*, from which we contend that the case at bar cannot in principle be distinguished.

3d. The case of Kimmish *v.* Ball, 129 U. S. 217, which is cited in the opinion of this court as one directly in point, is, we respectfully suggest, entirely inapplicable. In that case the State of Iowa had passed a statute providing that any person *having in his possession* "Texas cattle" should be liable for any damages accruing from allowing them to run at large, and thereby spread the disease known

as "Texas fever." That statute had nothing whatever to do with interstate commerce, and applied merely to property belonging to and in the possession of citizens of the State and therefore *mingled with* the property properly under the jurisdiction of State laws. A previous section of the Iowa statute was directed against the importation of Texas cattle into the State of Iowa, except under certain restrictions, and the Supreme Court of the United States specifically distinguished between that section of the statute and the section making persons liable for damage accruing from allowing Texas cattle to run at large within the State, which latter section only was before the court:—

> "Section 4059, with which we are concerned, provives that any person who has in his possession in the State of Iowa any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large, and thereby spread the disease. We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate interstate commerce. We do not see that it has anything to do with that commerce; it is only leveled against allowing diseased Texas cattle held within the State to run at large. The defendants labored under the impression that the validity of Sec. 4058, which is directed against the importation into the State of such cattle unless they have been wintered north, is before us, and that a consideration of its validity is necessary in passing upon Sec. 4059, but this is a mistake."

See Kimmish *v.* Ball, 129 U. S., at pp. 220–221.

It is submitted that that case is so clearly distinguishable

from the case at bar that it can furnish no authority for a determination that the statute here in question is valid.

It seems to the petitioner that the case at bar presented, and upon a rehearing would afford, an opportunity for the assertion of a principle of what is and what is not a proper exercise of the police power of the State by way of quarantine or inspection laws to protect itself from the danger of infection from persons or cattle, and what is in its nature and essence as contradistinguished from this rightful exercise of the police power a burdensome imposition upon the interstate commerce, and therefore prohibited to be exercised by the States; and this principle is, that the State may, in the exercise of its police power, apply a most rigid scrutiny, in case of a well-recognized danger, of all that passes its border. This it does at great inconvenience to itself, and its good faith is evidenced, by the expense which it imposes upon itself for the safety of its citizens. If every train is stopped, investigated, fumigated, and its contents of passengers or cattle held for inspection or quarantine for a reasonable period, however onerous this may be, it is an incident of the exercise of the police power and must be borne by the transporter and consignees of the cattle, or by the transported and consigned, but on the other hand the State cannot neglect its own duty of investigation and scrutiny, free itself from all expense and throw upon the carrier a tyrannous burden by passing a law imposing upon said carrier a great loss in the interstate transportation of healthy, as well as unhealthy cattle, and call this the exercise of the police power for the safety of its citizens and their property, and this loss and injury to the carrier is imposed, although the carrier may have no reason to suspect in the transaction of his business of interstate commerce that the cattle which he transported are infected, and although he exercises every precaution and every care to prevent the carriage of infected cattle. The

Kansas law says in effect to the carrier: "If you do carry such cattle, and long after your connection with the act of transportation has ceased, notwithstanding you are free from negligence and the State has allowed them to come freely into its borders, if they communicate disease, you, the carrier, are responsible for an act which is entirely innocent on your part, and which is performed by you as part of your duty in interstate commerce transportation." This wrongful transfer of the duty which is due from the State to its citizens to protect their herds from the danger of contagion upon the carrier consitutes so onerous a burden that it seriously impedes the free movement of property the carriage of which is entirely proper, and is a duty which the carrier owes to the public. Such a law does not discriminate between healthy and diseased cattle, but imposes upon the carrier of all cattle a tax and a penalty more serious than any which has been presented to the consideration of this court in previous cases, and which in much milder forms have been visited with this court's condemnation.

Suppose the State of Kansas had passed an animal inspection law, and for the purpose of relieving itself of all expense had imposed a tax of two dollars a head on all sound or unsound cattle passing as interstate commerce through or into its borders, payable by all carriers into the treasury of the State, for the purpose of defraying the direct and incidental expense of such State inspection and for the general enforcement of the law, would not this court have declared such a law unconstitutional, because it is a tax on interstate commerce? Has not in effect the State of Kansas (by the law under consideration in the case at bar imposed upon the movement of cattle as an act of interstate commerce and carriage a risk of a penalty, and withal exacted contrary to the principle of the common law by a presumption of negligence resulting in verdicts for

large amounts), enacted precisely the same kind of a law as the clearly unconstitutional one, except that it is worse, as the Kansas statute is unequal and capricious in its operation, instead of having the merit at least of being an equal tax upon all carriers alike?

IV.

All legislation in Kansas touching Texas fever has been had since the Missouri Act of 1872 was decided unconstitutional by this court in Husen case (95 U. S.), in 1877. The Missouri statute, in its first section, provided against driving or otherwise conveying Texas cattle into "any county of the State," and in the ninth section, against bringing the cattle "into the State."

(See Missouri statute, 95 U. S. 465–6.)

The Kansas statute sued on provides only against driving or transporting Texas cattle "into or through any county of the State" (Section 6774, p. 13 our original brief), and the previous laws of Kansas (Sections 6754, p. 8, and 6771, p. 11, original brief) only relate to driving or keeping the Texas cattle "in any county of the State." Why did not the Kansas statute deal with the bringing of the Texas cattle "into the State" like section 9 of the Missouri statute? The first section of the Iowa law reviewed in Kimmish *v.* Ball dealt "with bringing the Texas cattle into the State," and the second section dealt only with "having the cattle in possession in the State." The court in deciding Kimmish *v.* Ball, expressly refrained from passing on first section. Therefore we contend that the legislative thought in Kansas was that the State could not legislate against bringing the cattle into the State, but could only deal with them after they came into the State.

The Missouri statute, in Sec. 1, in so far as it deals with the driving or otherwise conveying the cattle into "any

county of the State, is like the Kansas statute which prohibits the driving or transporting the cattle "into or through any county of the State." To more clearly express our idea, the Kansas statute in the respect indicated is a substantial re-enactment of the Missouri statute, but leaving out the prohibition in the Missouri statute that the cattle should not be brought into the State.

When Kansas adopted the Missouri statute it adopted the construction which the Missouri courts placed on their statute (See Interstate Com. Com. *v.* B. & O. Ry. Co., 145 U. S. 263).* As early as 1877, long before the Kansas legislation, the Missouri Supreme Court, in Surface *v.* H. & St. J. Ry. Co., 60 Mo. 216, had construed Sec. 3, relating to driving or conveying Texas cattle "into any county of the State," as follows: "Where Texas cattle "are during the prohibited season brought by a railway "company into one county of the State, and afterwards "transported by an owner, having no connection with the "road, into another county, such transportation under the "law would be a new offense independent of the first and "for disease communicated by the cattle while in the "county into which they had been so transported, the "company would not be liable."

The true construction of the Kansas statute is that it does not deal with the bringing of the cattle into the State and that the railroad company having brought the cattle into the State and delivered them to the owners, and they having driven them from Lyon to Chase county, and the disease having been communicated there long after the railroad company's act of transportation had ceased, the company is not liable.

The Kansas Supreme Court has construed its statute contrary to its meaning and in violation of well-settled

* See also Mo. Pac. Ry. Co. *v.* Haley, 25 Kan. 35. And McDonald *v.* Hovey, 110 U. S. 619.

rules of construction, and this court holds itself bound by such construction. What is the construction placed upon the Kansas statute to justify holding the railway company, nothing more nor less than that, for the mere bringing the cattle into the State with full notice to the quarantine officers of their coming, the railroad company is held for damages remotely occurring after the cattle had passed from the county where the company delivered them, into an adjoining county, because it might by the exercise of diligence, have known more than the owner or the expert official inspectors? If the Kansas court has construed its statute wrongfully,— this court should at least consider that fact in determining the injustice of the construed statute. The true construction of the Kansas statute should be ascertained by this court also to enable it to determine what was meant by the congressional legislation involved in this suit. Congress in Section 6 of the act dealt with the act of transportation by the railroad company from one State to another in the interest of the public to prevent the spread of the fever and to cover the act of interstate transportation which had not been covered and was supposed could not be covered by State legislation. If the Kansas act as construed held the company liable for anything it did or failed to do after the cattle were in the State there might be some reason to sustain it under the police power of the State. The only thing done by the company of which complaint is made was the act of interstate transportation and that the State could not deal with, Congress having undertaken to regulate it.

The record in this case fairly shows that the railroad company practically delivered the cattle in question into quarantine for the inspection of the Federal and State officers in Kansas, for they all knew they were coming and knew more about them and their liability to disease

than the company. The Kansas statute relating to quarantine show that it is expected that Texas cattle liable to communicate Texas fever will be brought into the State. Provisions are made for inspecting and seizing them, holding them in quarantine, keeping them excluded from other cattle, selling them at judicial sale, and turning them over to their owners when the dangerous time has passed. The facts recognized by the quarantine laws of Kansas that the cattle can be seized, sold at judicial sale, kept and the charges for their keeping made a lien upon them all show they are articles of commerce. Indeed the Kansas law recognizes that for the injuries done by the cattle liens shall arise in favor of the injured parties and they may be seized and sold as articles of commerce at judicial sale to pay the judgments for damages they themselves occasioned. In the present case the Texas cattle in question were proceeded against *in rem* and they were seized and sold at judicial sale, the claims of the claimants and costs and expenses of the case having been adjudged a lien against them. These cattle were much more articles of legitimate commerce than intoxicating liquors are in the prohibition States, for generally in those States such liquors are so outlawed as not to be the subject of either private or judicial sale. These cattle were property in and out of Kansas and subject to barter and sale. These cattle were wholesome food and could only do harm when brought in contact with the domestic cattle on the same range or in the same pastures.

Suppose a State statute made a railroad company, knowingly bringing intoxicating liquors into the State from another State liable for all injuries done by the liquors after they left the possession of the company and passed to the consignees or those claiming under them. Would there not be universal agreement that such statute would be unconstitutional as in conflict with the commerce clause of the

constitution of the United States? Would not such State legislation be directed against interstate commerce in intoxicating liquors? Would it not be a burden on such commerce? Would it not be a prohibition in part at least against such commerce? Would it be an answer to say that prohibition laws are justified under the police powers of the State and that such laws are to preserve the health and promote the morals of the citizens by withholding liquors from their consumption?

Has a brewer or distiller a higher right to have his products moved from State to State than a cattle raiser in Texas?

The Supreme Court of Kansas also violated a fundamental rule of statutory construction in holding the railroad company liable if it might have known by the exercise of diligence that the Texas cattle were capable of communicating the disease, though it may not have had actual knowledge.

The Kansas statute, reading both sections together, makes the company liable only when it has full knowledge or notice that the Texas cattle are capable of communicating disease. This is radically different from making the company liable, if it might, by the exercise of diligence, have known. In the one case the company knowing the cattle's capacity to communicate disease and then taking them into any county of the State, implies a wilfullness and reckless indifference to the rights of the owners of domestic herds that might well be made the ground for an action by a constitutional enactment. On the other hand if the company is required to ascertain by due diligence whether the cattle have a communicable disease then the burden of inspection by experts and the exercise of a very high degree of care is imposed upon the company. If the company with experts and scientists is required to examine the cattle when they are tendered for an interstate commerce shipment then a most burdensome enactment is imposed on

such interstate commerce and one that the State should not be permitted to impose specially when as we have shown Congress has regulated the subject by imposing a civil and criminal liability on the company for knowingly transporting the cattle from one State to another.

We again submit with due deference to the judgment of this court that in order to determine the questions under consideration in the case at bar, it should ascertain the true construction of the Kansas statute. Such an inquiry we contend will show that the Kansas courts have placed a wrong construction on their statute.

That the words "knowledge" or "notice" as in the Kansas statute, are not the equivalent of "might know" by the exercise of due diligence: — See Reg. *v.* Briggs, Dearl. & B. 98, where it was held that the word "known" used in a criminal statute was not the equivalent of "or had the means of acquiring knowledge if made use of." Much less is the word "known" equivalent to "might have known by the exercise of due diligence." In the civil cases Iron Silver Mining Co. *v.* Reynolds, 124 U. S. 374, and U. S. *v.* Iron Silver Mining Co., 128 U. S. 673, this court held that the words "known to exist" meant "actual knowledge" and not mere "belief." The reading of the opinions in these cases can leave no doubt that this court would not have construed the words "known to exist" as being the equivalent of "might by the exercise of due diligence have been known to exist."

The true construction of the Federal statute, as well as of the State statute, is that the company is only liable if it had actual knowledge.

Is not the true construction of these statutes high evidence that Congress and the Kansas legislature thought it unwise to burden interstate commerce with liability of the railroad company for what it might have known as distinguished from what it actually knew. If so can this court

sustain the Supreme Court of Kansas in placing this additional burden on interstate commerce by a wrong construction of its own legislation?

Finally we contend this court should consider the true construction of the Kansas statute as against the claimants' construction or Kansas court's construction in order to determine what law governs the civil liability of the railway company under the facts disclosed by this record.

The railway company has been held liable under a Kansas statute which does not really create any liability except by wrongful construction, when its liability, if any, is only under the Federal law and this suit is not based upon that law.

If the Kansas statute rightly construed does not make the railway company liable in this case then the *ipsi dixit* or fiat of the complainants or the Kansas courts cannot make it liable, Congress having regulated the liability, civil and criminal, of the company for transporting the cattle from one State to another, and such regulation being exclusive.

Congress has regulated the act of transportation by railroad companies of Texas cattle with a communicable disease, from one State to another, by prohibiting the same, and its prohibition, when violated, gives a civil right for damages and imposes a criminal penalty. The Kansas statute, as construed, permits the same kind of cattle to come into the State from another State and imposes a civil liability for damages resulting from bringing the cattle into the State, though such damages result after the cattle have left the possession of the company. The State, therefore, in defiance of the prohibition of the Federal act, permits, so far as it can, interstate commerce in these cattle, and then makes such an act of interstate transportation a ground of civil liability for damages caused by the cattle long after the carrier has parted with them. Is not

such imposition by the State of such onerous liability the rankest kind of a blow at the very act of interstate transportation which it has invited?

V.

Your petitioner respectfully submits that the above reasons are of sufficient importance to influence this court to grant a rehearing of the questions involved. The judgment rendered by this court if it is allowed to stand will be fraught with the most serious consequences, not alone to all railroad companies doing business in the southwestern section of the country, and to owners of domestic herds of cattle in the various States and Territories of the Union, but to the shippers and cattle-raisers of that region whose products no carrier under the rule announced by this court will hereafter be able to transport except under the most onerous and burdensome restrictions. And if by reason of any matter not having been sufficiently drawn to the court's attention the court has rested under a misapprehension as to any point involved, which misapprehension if cleared up might result in a different judgment, the importance of the case is, we submit, sufficiently great to justify a reargument.

Your petitioner therefore respectfully prays that this case be restored to the docket and a reargument ordered.

SIMON STERNE,
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Attorneys for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

The undersigned, counsel for the plaintiff in error, believing that the ends of justice would be served by a rehearing of this cause, and believing also that the facts and reasons stated in the petition for rehearing constitute a good ground for asking a rehearing of this cause, so certify in support of the petition, as required by the rule of this court.

SIMON STERNE,
JAMES HAGERMAN,
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

No. 268.

Brief of Hagan for D. G.

Filed Oct. 20, 1897.

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IN THE

Supreme Court of the United States.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
CHARLES HABER, ET AL.,
Defendants in Error.

No. [redacted] 26

BRIEF OF DEFENDANTS IN ERROR.

IN THE

Supreme Court of the United States.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, Plaintiff in Error, vs. CHARLES HABER, ET AL., Defendants in Error.	No. 664.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

For a year or more prior to 1892, Hosier Brothers owned a large ranch, about forty miles square, in Pecos county, Texas, which fronted on the west side of Pecos river, about the mouth of Independence creek. On this ranch they held a large number of cattle, which were accustomed to range up and down the Pecos river and on both sides of the river in the counties of Pecos, Val Verde and Crockett, on both sides of the government quarantine line.

In the early part of the year 1892, they determined to bring two or three thousand of these cattle to Kansas to be put upon pasture and prepared for market. They engaged Brogan & Son, who controlled a large pasture in the southeast part of Chase county, Kansas, to take these cattle into their pasture, and negotiated with the Atchison, Topeka & Santa Fe Railway Company, and the Missouri, Kansas & Texas Railway Company, about shipping these cattle from Texas to Kansas.

The Santa Fe company had a station—Bazaar—quite near the Brogan pasture, while the nearest station on the Missouri, Kansas & Texas was Hartford, some twenty-five miles from the Brogan pasture. The business was sought after by the agents of the company, and the negotiations finally resulted in a contract being made with the Missouri, Kansas & Texas to ship from Midland, a station on the Texas Pacific Railroad, in Texas, to Hartford, at a rate of ten dollars per car less than the Santa Fe company would do the business for.

Brogan claimed on the trial that the railway company agreed to pay him for driving the cattle from Hartford to his ranch in consideration of his aiding the company in securing the shipment over its road instead of the Santa Fe.

Midland, the station from which the shipments were made, is north and west of the quarantine line established by the Bureau of Animal Industry, but the line of the Texas Pacific Railroad crosses into the infected district a short distance east from Midland, and the whole route over which the cattle were shipped, thence to the south line of Kansas, is included in the infected district. The Hosier ranch is immediately west of and adjoining this line. The range over which these cattle roamed was on both sides of this line, east and west, within and without.

The location of the Hosier Brothers' ranch was fully known to the officers of the Missouri, Kansas & Texas company who made the contract for the transportation of these cattle, and it was known to them that the cattle were upon this ranch and were to be driven from there to Midland for shipment, and that they were to be driven across the country from Hartford to the Brogan pasture, for the purpose of being pastured there.

On April 28 and 29, and May 10, 1892, some nineteen hundred head of these Hosier Brothers' cattle were shipped from Midland, billed through to Hartford. They had, in the few days preceding those dates, been driven up from the Hosier Brothers' ranch. Permits on the forms authorized by the Board of Live Stock Commissioners of the State of Kansas, based upon the affidavits of two men in Texas, had been issued to Hosier Brothers to ship these cattle, by Albert Dean, United States Live Stock Inspector, who also acted for the Kansas Live Stock Board.

When these shipments reached Fort Worth, on their way east and north, they were inspected by Howard

Rhodes, an inspector of the Bureau of Animal Industry, United States Department of Agriculture, who there observed, without any difficulty, that about half of them had upon them a parasitic insect called a Texas fever cattle tick, or, for short, a Texas cattle tick. The presence of this tick appears, from the testimony of the experts, Mr. Rhodes, Mr. Rodgers and Dr. Richards, to be strong, and when found on cattle from a low southern altitude, certain evidence of the liability of such cattle to impart Texas, splenic, or Spanish fever to native or northern cattle.

At Parsons, Kansas, these cattle were again observed by A. M. Hunter, another government inspector, but because they were accompanied by the permit of his superior officer, Albert Dean, they were allowed to proceed. He, however, noticed the ticks, and, having his suspicions aroused as to the safety of the cattle, communicated his suspicions to the officers of the Missouri, Kansas & Texas company at the time, and he and Mr. Worth, the train master of that road, at Parsons took a passenger train and followed up these trains of stock to Hartford, and, having again observed the cattle, he told Mr. Worth that they would "set the country afire."

The cattle were, however, unloaded in the company's pens at Hartford and from thence driven, under the direction of Brogan, west, across Lyon and into Chase county, to the Brogan pasture, and over every foot of this twenty-five mile drive scattered the germs of Texas, splenic or Spanish fever, so that in due course of germination the native cattle were attacked thereby and hundreds of them died, to the damage of about one hundred and fifty farmers and cattlemen, in the sum of at least fifty thousand dollars.

The amended petition, on which this action was tried to a jury, set out in brief the above facts. It alleged that the Missouri, Kansas & Texas Railway Company "had

knowledge * * * and had reason to know that said Texas cattle so kept, shipped, transported and driven were a kind capable of communicating, and liable to communicate and impart, said disease to the domestic cattle of this state, and to the cattle of the plaintiff." And it further alleged that the acts so done were in contravention of the laws of the State of Kansas.

This amended petition made as defendants, not only the Hosier Brothers, the owners of this Texas herd, but the railway company and Brogan & Son, and also all of those who lost cattle by reason of the infection.—A provision of the Kansas Statute gives, for damage suffered, a lien upon the cattle distributing the disease, so that all who lost were jointly interested.

The railway company answered with a general denial, and further—so far as the same raised any Federal question—substantially, that it was a common carrier engaged in interstate commerce. That it received from a connecting carrier the cattle mentioned, at Denison, Texas, without any knowledge of their dangerous character. That the cattle were shipped from without the quarantine line established by the Secretary of the Department of Agriculture, and that because they were thus shipped and because they came immediately from a territory, adjudged by the Department of Agriculture to be safe, that the railway was protected in their shipment, no matter how dangerous the cattle proved to be to the cattle industry of Kansas.

In other words, that the United States Government by the acts establishing the Bureau of Animal Industry, and the Secretary of Agriculture in his orders and acts carrying the same in execution, had assumed to take the entire question of the interstate shipment of dangerous animals away from state control, and had thereby authorized and permitted such shipments. And that the

defendant railway company was justified in such shipments, and protected from the damages caused thereby.

The interpleading defendants filed answers similar in tenor to the petition of plaintiff Haber, and the issues were closed by general denials.

Upon these issues the parties went to a jury. The plaintiff took the burden of showing that the officers of the railway company had knowledge of the dangerous character of these Texas cattle, or knowledge of such facts as would import such knowledge. He showed that the officers with whom the contract of shipment was made, were informed as to where the cattle were to come from —page 54, printed record. That the ticks were easily detected—pages 134, 135, 50, 96, 101, 102, printed record. That the presence of these ticks was a sign of danger—pages 134, 138, 139, 149, 150, 154, 155, printed record. That the establishment of the quarantine line was mere guess work and gave no assurance that cattle from without were safe—page 256, printed record. That officers of the road, either Coley, agent at Parsons, or Worth, the train master at the same place, were informed by Hunter of the dangerous character of these cattle—page 51, printed record—and that incited thereby, Worth followed them up to Hartford, but did not interfere with their being unloaded. That again, on their way back from Hartford and in ample time to have had the drive stopped—the cattle at the time not having left the pens—Hunter told Worth that they would "set the country afire."

The trial court pursuing the theory of the plaintiff of a common law liability as well as a statutory one, instructed the jury that in order for them to find for the plaintiff they must find from the evidence "that the officers, employees, or agents of the railway company defendant had knowledge that such Texas cattle, transported by it into this state, were liable to impart such disease to the native cattle of this state, or that they ought by the exer-

cise of diligence and care to have known of the dangerous character of these cattle, and that they would, or were liable, to impart said disease to the native cattle of this state." Again, "The fact that it (the railway company) "did bring them (the cattle) from some point on its line "of road south of the south line of Kansas, makes it liable, "*provided* it had knowledge, if such is the fact, of the "dangerous character of these cattle, or ought to have "known it under the instructions heretofore given you." Again, "It is the duty of any one in pursuit of any lawful "business to exercise due care and caution that others "shall not be injured thereby; and while a common car-"rier, such as is the defendant railway company, is bound "to accept for transportation any freight tendered it which "it may be lawful to carry, it must exercise due care and "caution in doing this that it does not invade the rights of "others, and it is not required to take for transportation, "or to transport, any article forbidden by the law to be "transported, or the transportation of which will injure "others, provided it can ascertain by due diligence, that "such article is liable to injure or cause damage to those "with whom it may come in contact during its transpor-"tation or at its destination."

The jury found a general verdict in favor of the plaintiff and also in favor of the one hundred and forty-five cross-petitioning defendants.

The case was taken on error by the railway company to the Supreme Court of Kansas where it was affirmed, and now is brought to this Court on error by said company. This statement of facts is taken quite largely from the statement of facts found in 56 Kansas, page 654, where this case is reported.

SYLLABUS OF BRIEF.

First. There is no Federal question involved, and this Court has no jurisdiction of this cause, and therefore the writ of error should be dismissed, because:

(*a*) There was not drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States, etc., nor was the decision against their validity.

(*b*) The validity of no law of Kansas was drawn in question which was repugnant to the Constitution, treaties or laws of the United States.

(*c*) The decision of the State Court was not against any title, right, privilege, or immunity claimed under the Constitution or any treaty, or statute of, or commission held or authority exercised under, the United States.

Second. This court is without jurisdiction even though there is a Federal question presented, because the pleadings, proof and decision were broad enough to sustain the judgment under the Common Law.

Third. There is no conflict between the United States statute and the State law.

Fourth. The Kansas laws involved were a proper and warranted exercise by the State of its inherent police power.

Fifth. If this court has technical jurisdiction and a Federal question is involved, such Federal question was properly decided by the State Supreme Court; and its judgment should be affirmed.

BRIEF OF DEFENDANTS IN ERROR.

There is no Federal question involved, and this Court has no jurisdiction of this cause, and therefore the writ of error should be dismissed, because:

(a) There was not drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States, etc., nor was the decision against their validity.

(b) The validity of no law of Kansas was drawn in question which was repugnant to the Constitution, treaties or laws of the United States.

(c) The decision of the State Court was not against any title, right, privilege, or immunity claimed under the Constitution or any treaty, or statute of, or commission held or authority exercised under, the United States.

We state the cause in our amended petition, and on which issues were joined (Record, pages 8 and 9), as follows:

"That the defendants, Hosier Brothers, owned and kept in the State of Texas two thousand three hundred head of wild, undomestic cattle, and at a point south of the thirty-seventh parallel of north latitude, (the same being the southern line of Kansas), and all of said cattle were afflicted with Texas, splenic, or Spanish fever, and liable to and capable of communicating said disease to any of the native cattle of Kansas; that between April 1 and July 15, 1892, said defendants, Hosier Brothers, the Missouri, Kansas & Texas Railway Company and * * * * * kept, shipped, transported, drove and brought said two thousand three hundred head of Texas cattle from a point in Texas south of the thirty-seventh parallel of north latitude, into the State of

Kansas, in violation of an act of the legislature of the State of Kansas, entitled, 'An Act for the protection of cattle against contagious diseases,' and known as chapter 161 of the Laws of 1881, and acts amendatory thereof and supplemental and additional thereto," and averred damages and prayed judgment. Plaintiff also made all parties who had lost cattle by this disease and all who claimed liens thereon, defendants in said amended petition.

The defendants who had suffered from this scourge answered making claim for their damages same as the plaintiff.

The so-called Federal question, quite elaborately set out in the above "Statement of Facts," is embraced in the fourth defense of amended answer of defendant railway company, commencing at line twenty-five, page twenty-one, printed record, and ending with line forty-five, page twenty-two.

When legally stated this assumed Federal question is this and nothing more:

First. The Congress on May 9, 1884, passed an act entitled "An Act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle and provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals," and that the Congress again, on April 4, 1891, passed another act making appropriations for the Department of Agriculture; and,

Second. That on February 26, 1892, the secretary of the Department of Agriculture issued a circular under section seven of the act of 1884 and caused the same to be served on railroad companies, and that these acts and circular were superior to any state law and protected the railway company in all it had done in the premises. (Printed record, pages 26, 27 and 28.)

It will be noticed that said section seven simply requires the Department of Agriculture to notify railroad companies. It nowhere suggests that such department make any quarantine regulations. It nowhere suggests that the officer make a map of the country and draw an imaginary line, on one side of which is comparative safety and on the other side of which danger lurks.

The whole act of 1884 shows that the Congress was seeking to exterminate diseases; not to protect railroads in disseminating disease broadcast by dumping dangerous animals into and driving them through a sovereign state; nor does it anywhere suggest that the proper police regulations of a state may be ignored and trampled upon.

In no sense does the legislation of Congress conflict with the legislation of Kansas.

First. In the matter of jurisdiction; we do not mean that of our State Courts; but of this Court.

It was asserted by this Court, in 8 Peters, 323:

"It must be conceded that the court of *dernier* resort in every state decides upon its own jurisdiction, and upon the jurisdiction of all inferior courts to which its appellate power extends."

Second. The assumed jurisdiction of this court is not inherent: it is not conferred by the constitution, and if it exists at all in the case at bar it is from and because of section 709, Revised Statutes, United States, which reads:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the *validity* of a treaty or statute of, or an authority exercised under, the United States, and the *decision is against* their *validity;* or where is drawn in question the *validity* of a statute of, or an authority exercised under, any state on the ground of their being *repugnant* to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

As the assumed jurisdiction is confined to, and conferred by this section, the section is naturally and necessarily re-

strictive. Nothing is to be taken by intendment and nothing interpolated by construction or analogy; and whatever is not there embraced is per force excluded.

If a pleader should attempt to assert a right because of some written instrument or statute which he pleaded, and the instrument or statute negatived all such right, we claim as matter of pleading that the pleader has not asserted such right. If the Federal Statute to which the pleader refers clearly shows, by its language, its context, and the subject matter of legislation, that no such assumed right is guaranteed nor exists, and that there is no conflict whatever between the State law and the supposed Federal law or regulation, we then insist, as matter of law, and as a fair construction to be given the limited and restricted jurisdiction of this Court, that the thing claimed or assailed, as the case may be, is not "drawn in question."

As above stated, the only real *claim* legally made by plaintiff in error is that the act of Congress referred to in its fourth defense authorized the Secretary of Agriculture to do what he could alone, or in connection with the State authorities, to stamp out a dreaded disease and protect the native herds from its ravages; and that the secretary did issue some regulations, no element of which was permissive, or granted any authority, but were all restrictive and bristling with limitations upon what might be ordinarily called the rights of a common carrier. Indeed Congress undertook to and did limit and restrict the carrier's previous rights. It did not even assume to grant the carrier any rights, nor did it assume to restrict the powers of a State.

It does not occur to us that any one of the three grounds, embraced in said section as warranting the jurisdiction of this court, exists.

It must be borne in mind that the suit below did not involve the suppression or extermination of disease among cattle; that it had nothing whatever to do with the interstate commerce of the country; but was simply an action to recover damages for negligence and wrong, amply stated for a common law action, but more especially predicated upon the Kansas Statutes hereafter quoted.

Were it not for the fact that the Kansas Statutes gave us a lien and our law of liens authorized us to make all parties in interest parties to one suit, we need not have mentioned the Kansas Statute, but relied wholly upon the common law. This Court will not consider whether the Kansas Courts properly construe our lien laws.

No act of Congress ever assumed to take any action in regard to this question of damage. Hence, under the first clause of section 709, it cannot be affirmed that there was drawn in question the ***validity*** of any treaty or ***statute*** of the United States. A Federal Statute was discussed and construed by the State Court, but its validity was never drawn in question; and as no act of Congress and no circular or order of the Department of Agriculture ever assumed to say that under any set of circumstances existing in this record was the shipment of cattle into Kansas, and thence to be driven through our native herds, to be done with impunity and without damage. Hence, no authority exercised under the United States, by anyone, was ever "drawn in question."

It may be asserted by a reckless pleader under the second clause or right, that any and every act of a State is repugnant to the Constitution and laws of the United States, but when such laws are pleaded and appear at first blush, in so far as they may approach the same ground, in perfect harmony with the Federal laws, it is insisted that such State law is not "drawn in question."

There can be no pretense that any "title, right, privilege or immunity" claimed under the United States, was ever drawn in question in the State Courts, nor was there any decision against such title, right, privilege or immunity.

The State Courts held every Federal Statute and every action of the Secretary of Agriculture valid. It held, and we think properly, that the acts of the plaintiff in error were plainly in violation of the Federal Statute, but the court did not hold that the Kansas laws were repugnant to any Federal law or authority, but that they were in strict harmony therewith. Suppose the State Court erred in this and that the railroad company had not violated a Federal Statute; that would not raise a "Federal question." The averments of the

railroad company's answer show that it did not have any rights under any Federal law, power or authority, which could in any manner be involved in this case. The company's answer *assumed* things that the pleaded act of Congress did not confer but clearly denied.

To state the matter in another form:

Under the first clause the decision was not against the validity of any Federal law or authority; hence could have no application to the case at bar. Under the second clause we concede that the decision was in "favor" of the "validity" of the Kansas Statue, but insist that the court could and did decide it on other grounds broad enough to sustain the decision, and therefore the so-called Federal question should be ignored.

Until we hear some reason why the third clause of section 709 can possibly apply, we shall assume it does not. It may be asserted that the railroad company "claimed privilege or immunity," but its statement of the Federal authority which it claimed granted such "privilege or immunity," clearly gave none, but denied the existence thereof.

As we construe the law and decisions thereunder, a Federal question must exist as a matter of law and fact, and not be *manufactured* by a naked assertion. Or, as stated by this Court in Millingar vs. Hartupee, 6 Wall., 261:

"Something more than a bare assertion of such an authority seems essential to the jurisdiction of this Court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words The act would have given jurisdiction in cases of decisions against *claims* of authority under the United States.

In respect to the question we are now considering, 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and on looking to the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this Court could review the decision of a State Court, that the right claimed did not exist."

It is to be noticed that it is an *actual, existing* "title, right, privilege, or immunity" which is "claimed" and which is set up and relied on; not that there is such a claim made—not that the pleader simply "claims" a "title, right, privilege or immunity"; but that the thing he "claims" *is such* when "claimed" and when so "claimed" that it appears an existing reality. That an *examination* of the law, treaty or authority, shows it is what is claimed for it.

This Court has frequently stated that it will not examine the pleadings in the record to see whether the State Court properly ruled thereon.

Grand Rapids & Ind. R. R. Co. vs. Butler, 159 U. S., 87.

This Court has also said:

"Where the validity of a State law is not drawn in question, but merely its construction, no Federal question arises."

Lloyd vs. Matthews, 155 U. S., 222, 227.

"It must be that such question was necessarily involved in the decision, and that the State Court would not have given judgment without deciding it."

R. R. Co. vs. Peck, 4 Wall., 180-1.

We here quote the entire opinion in Hammond vs. Johnson, 142 U. S., 73, 78.

"It is well settled that where the Supreme Court of a state decided a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."

In Eustis vs. Bolles, 150 U. S., 361, 366, this Court says:

"It is settled law that to give the Court jurisdiction of a writ of error to the State Court it must appear affirmatively not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause and that it was actually decided adversely to the party claiming a right under the Federal Constitution, or that the judgment, as rendered, *could not* have been given without deciding it."

In Jenkins vs. Loewenthal, 110 U. S., 222, it is said:

"Where the record disclosed two defenses to an action brought in a State Court, one presenting a Federal question and one presenting no Federal question, either of which, if sustained, was a complete defense to the suit, and that the State Court gave judgment in favor of the defendant on both, and the cause is brought here by writ of error, this Court will affirm the judgment below without considering the Federal question."

In Scott vs. Jones, 5 How., 374, it is stated:

"This being a writ of error to a State Court, sued out with a view to reverse its decision, * * * * the only authority and the only ground for our interference with the decision of the State tribunals is in substance, that they have overruled some right or defense set up under an act of Congress, or treaty, or Constitution of the United States. 14 Pet., 46, 353; 12 Pet., 66; Williams vs. Norris, 12 Wheat., 124."

In this connection, and as sustaining the above quotations and our contention in this entire case, we ask attention to the following cases heretofore decided in this Court, viz:

Klinger vs. Missouri, 13 Wall., 257, 263.
Chouteau vs. Gibson, 111 U. S., 200.
Otis vs. Oregon Steamship Co., 116 U. S., 548.
Jacks vs. Helena, 115 U. S., 288-9.
Adams Co. vs. B. & Mo. R. R., 112 U. S., 123.
De Saussure vs. Gollard, 127 U. S., 232.
Cook Co. vs. Canal & Dock Co., 138 U. S., 635.
McLaughlin vs. Turner, 154 U. S., 663.
Hopkins vs. McLure, 133 U. S., 380.
Blount vs. Walker, 134 U. S., 607.
New Orleans vs. Waterworks Co., 142 U. S., 84.
Brown vs. Atwood, 92 U. S., 327-9.
Nichols vs. Levy, 5 Wall., 433.
Bank vs. Citizens' Bank of La., 14 Wall., 9.
Sevier vs. Haskell, 14 Wall., 13, 14.
Gibson vs. Chouteau, 8 Wall., 314.
Commercial Bank vs. Rochester, 15 Wall., 639.

The Kansas Statute of 1881, section 7, chapter 161, read:

"*Section 7.* Any person or persons who shall drive or cause to be driven into or through any county in this state any of the cattle mentioned in section 1 of this act, in violation of this act, shall be liable to the party injured for all damages

that may arise from the communication of disease from cattle so driven, to be recovered in civil action; and the party so injured shall have a lien upon the cattle so driven."

This section was materially amended by chapter 201 of the Laws of 1891. Ten years' experience had convinced the legislature that the old law was inadequate, and the legislature saw fit to amend. Every amendment of a law should be construed as intended to accomplish something, and every new word used, or new provision adopted, is to be extended to the extent the language goes, to effect the desired change.

The law above quoted required that before any liability occurred by such driving, the cattle were in fact to be diseased with Texas fever. The new law changed that by fixing the liability where the cattle were either liable to or capable of communicating that disease and did communicate it. The old law gave the party injured a lien upon the cattle. The new law gives a first lien, and we here quote the section as it now stands and as it stood during all the time involved in this suit.

"*Section 7.* Any person or persons who shall drive, ship or transport or cause to be shipped, driven or transported into or through any county in this State, any cattle liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of this State, shall be liable to any person or persons injured thereby for all damages that they may sustain by reason of the communication of said disease of Texas, splenic or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction, and the parties so injured shall have a first and prior lien to all other liens for such damages on the cattle communicating the disease of Texas, splenic, or Spanish fever."

Section 7, just quoted, and being really an amendment of section 7 of the Laws of 1881, is numbered section 3 of chapter 201, of the Laws of 1891.

Section 4 of said chapter 201 is section 6775 of the General Statutes of 1889, amended, and reads as follows:

"In the trial of any person charged with the violation of any provisions of this act, and in the trial of any civil action brought to recover damages for the communication of Texas, splenic or Spanish fever, proof that the cattle which such person or persons are charged with shipping, driving, or

keeping, or which are claimed to have communicated the said diseases, were brought into this State from south of the thirty-seventh parallel of north latitude, shall be taken as *prima facie* evidence that such cattle were, between the first day of February and the first day of December of the year in which the offence was committed, capable of communicating and liable to impart Texas, splenic or Spanish fever, within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full knowledge and notice thereof. If the owner or owners or person or persons in charge of said cattle, shall show by such certificate or certificates, as shall hereafter be designated by the Live Stock Sanitary Commission of the State, that the said cattle had been kept since the first day of December of the previous year west of the twenty-second meridian of longitude west from Washington, and north of the thirty-fourth parallel of north latitude, the provisions of this section shall not apply thereto."

The most casual examination of the law of 1881 shows that it was drawn in the light of regarding the Texas cattle, which communicated the disease to our cattle, as themselves diseased. While this is a mooted question, the prevailing practical and scientific opinion is that the Texas cattle are not diseased, but it is conceded by everyone, and clearly shown in this record, that the thing imparted by the Texas cattle to our domestic herds is a disease when they get it; and the many hundred carcasses strewn along the route of travel would clearly demonstrate that fact.

The Legislature must be presumed to have known what everyone else knows, that Kansas has no commercial waterways, and therefore the words "ship" and "transport" aptly apply to railroads. Besides the law of 1891 (section 4, above quoted,) introduces a new element of knowledge and gives a new warning, and under the statute the railroad company did know that the cattle came from Southern Texas, hundreds of miles south of the Kansas line, and therefore would probably communicate this disease.

The Legislature of Kansas at its special session in 1884, chapter 5, enacted:

"That the Live Stock Sanitary Commission be authorized and directed to cooperate with the Commissioner of Agriculture of the United States, or any officer or authority of the

general government, in the suppression and extirpation of any and all contagious diseases among domestic animals, and in the enforcement and execution of any and all acts of Congress to prevent the importation or exportation of diseased cattle, and the spread of infectious or contagious disease among domestic animals."

Approved March 24, 1884.

We can imagine no line of reasoning which can show either, *first*, that Congress undertook by law or by authority conferred upon the Department of Agriculture to state that any shipment of cattle was safe. Or, *second*, that the least conflict exists between the Kansas law and any act of Congress or any regulation of the Department of Agriculture.

Permits, so-called, are pleaded, and yet there is no law, with which we are familiar, that gives any authority for issuing them, unless they are what are termed "certificates" in section 4 of the Kansas Statute above quoted, and it is insisted that they could not apply because Pecos county, where these cattle had roamed, is south of the thirty-first degree of north latitude, and Midland, Texas, where they were shipped, lies south of the thirty-second degree of north latitude.

We assert that neither the Congress nor the Department of Agriculture attempted to fix the liability or non-liability of railroads for unloading dangerous cattle in Kansas, and again insist that there is no conflict between the State and National authorities. But, if there was such conflict, we do not hesitate to say that the act of Congress, or the action of any Department in that regard, would be cleary in violation of the rights of the State and the people thereof, because trenching upon the police power.

11.

This Court is without jurisdiction even though there is a Federal question presented, because the pleadings, proof and decision were broad enough to sustain the judgment under the Common Law.

No question of practice seems to be more firmly established by this Court than this: that when a State Court has decided the case generally against the plaintiff in error, and there is in the case a Federal question, and also another question not Federal in its character, broad enough to sustain the decision of the Court below, this Court will not take jurisdiction to decide the case.

This view has been taken very many times by this Court.

"Where the Supreme Court of a State decides a Federal "question in rendering a judgment, and also decides against the "plaintiffs in error on an independent ground not involving a "Federal question and broad enough to maintain the judgment, "the writ of error will be dismissed without considering the "Federal question." Hale vs. Akers, 132, U. S., 554, 563.

"It must be that such question was necessarily involved in "the decision, and that the State Court would not have given "judgment without deciding it" Railroad Company vs. Peck 4 Wall., 160, 161.

"It is well settled that where the Supreme Court of a State "decides a Federal question in rendering a judgment, and also "decides against the plaintiff in error upon an independent "ground not involving a Federal question and broad enough to "maintain the judgment, the writ of error will be dismissed "without considering the Federal question.

Hammond vs. Johnson, 142, U. S., 78.

"In cases brought here by writ of error to the State Courts, this Court will not entertain jurisdiction if it appears that besides the Federal question decided by the State Court, there is another and distinct ground on which the judgment or decree can be sustained, and which is sufficient to support it. Kennebeck & Portland Railroad Company vs. Patten, Trustee, 14, Wal. 23.

This doctrine has been repeated so often by this Court that we cite no further authorities.

Now in the case at bar it is true that the plaintiff and cross-petitioners set out and counted upon the State statute forbidding the introduction of cattle liable to impart Texas fever, and alleged that the acts of the railway were in violation of those statutes, but the petitions also set out facts which would clearly establish a liability at common law. Upon the trial of the case the plaintiffs did not rest upon the showing that these Hosier cattle were "wild and of undomesticated habits," and were "from south of the thirty-seventh parallel of north latitude," as being *prima facie* evidence "that such cattle were capable of communicating and liable to impart Texas, splenic, or Spanish fever," as provided in the Kansas statutes, but they went farther than that, and assumed the burden of proving their common law action. Beyond a question, the evidence did abundantly support this view. The Court charged the jury along this line and clearly stated in effect that the plaintiff and cross-petitioners could not recover unless they had proven the common law phase of their action.

Justice Allen, of the Kansas Supreme Court, in his opinion in this case—page 295, printed record—says, "The evidence "shows that ticks, which are regarded as a strong, if not abso- "lutely certain, indication that the cattle are capable of commu- "nicating the disease, were plainly and easily discernable on "many of the cattle; that they were visable to the naked eye "and were seen by witnesses who observed the cattle at Ft. "Worth and at Parsons. Even if this were an action at com- "mon law for negligently spreading the disease, in view of the "now generally known fact that the disease of Texas or splenic "fever may be communicated to the domestic cattle of Kansas "by Texas cattle, and of the legislation in this and neighboring "states, and by Congress recognizing the existence of the disease "*a very strong case is made by the testimony against the com-* "*pany.* We think the instructions were eminently fair, if not "even more favorable than the law is toward the railroad com- "pany. They were told in the fourth instruction that they "must find from the evidence that Texas cattle were brought "into the State by the defendant; that the cattle of the plaintiff "and the cross-petitioning defendants became infected by the "disease imparted to them by such Texas cattle, and that such

"disease was Texas, splenic, or Spanish fever, and 'that the "officers, employees, or agents of the railway company defend- "ant had knowledge that such Texas cattle transported by it "into this State were liable to impart such disease to the native "cattle of this state, or that they ought by the exercise of dili- "gence and care, to have known of the dangerous character of "these cattle, and that they would or were liable to impart said "disease to the native cattle of this State.' There is nothing "in the instructions conflicting with the portion of the charge "above quoted. Under this, no harsh rule requiring the com- "pany to act at its peril with reference to the shipment, was "declared, but the jury w e told that it would only be liable "in case its representativ ailed to exercise care and diligence "to ascertain whether th attle were liable to impart the dis- "ease or not."

Counsel for plaintiff in error will not, we feel sure, claim in this Court that their client would be protected by any act of Congress, by any rule or order of the Secretary of Agriculture, by any permit of any board, from answering in damages, if their company had imported these death-dealing cattle into Kansas, knowing their dangerous character, or, if by the exercise of care and diligence, it or its officers or agents might have known of their dangerous character. No line, word or syllable of the act of Congress which they invoke, or the rules or instructions of the Secretary of Agriculture which they quote, can, by the remotest inference, be construed to give any protection to one willfully or negligently doing an injury to another by bringing into this State the germs of disease. On the contrary, the purpose of that act as expressed in its title is "to prevent the exportation of diseased cattle, and to provide "means for the suppression and extirpation of pleuro-pneumo- "nia, and other contageous diseases among domestic animals."

A common law right of action having therefore been presented in our petition, supported by evidence, fairly submitted to the jury by the instructions of the Court, and decided in favor of the plaintiff, in all of which no Federal question was or could have been presented, this Court will not now interfere, no matter what view it may take upon the question as to whether or not a Federal question was involved.

III.

There is no conflict between the United States Statutes and the State Law.

Arriving at the discussion of the Federal question, we most confidently aver that there is no conflict whatever between the United States Statute—chapter 60, General Statutes, 1884—the rules and orders of the Department of Agriculture promulgated thereunder, and the Statutes of Kansas.

We have already quoted the title of the act of Congress. The purpose is expressed therein. It was designed for the "suppression and extirpation * * * of contageous diseases among domestic animals."

Section one establishes a Bureau of Animal Industry and provides for a chief thereof, and defines his duties.

Section two authorizes the appointment of two competent agents, to examain and report upon the best methods of treating, transporting, and caring for animals and the means to be adopted for the suppression and extirpation of contageous pleuro-pneumonia, and to provide against the spread of other dangerous, contageous infectious and communicable diseases.

Section three makes it the duty of the Commissioner of Agriculture to prepare such rules as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules to the executive authority of each State and Territory, and invite their cooperation in the enforcement of the act. And further provides that whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State, where these diseases exist, or where such State had adopted plans and methods for the suppression of such diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever he shall be notified of the readiness of the State authorities to cooperate with the Commissioner of Agriculture for the extinction of such diseases, the Commissioner of Agriculture is authorized to expend money appropriated by the act to accomplish such purpose.

Sections four and five relate to the foreign trade and have no possible application to the matter in hand.

Section six absolutely prohibits all railroad companies from receiving for transport, and from transporting from one State or Territory to another, *any* live stock affected with any contagious, infections, or communicable disease; but provides that splenic or Texas fever shall not be considered a contagious, infectious or communicable disease, within the meaning of the act, as to cattle being transported to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

Section seven makes it the duty of the Commissioner of Agriculture to notify railroads, steamboats, and other transportation companies doing business through any infected locality, and any person operating such transportation facility who shall knowingly violate the provisions of section six should be guilty of a misdemeanor and punished.

Section eight provides in detail for the stamping out of contagious diseases in the District of Columbia.

Sections nine, ten and eleven have nothing to do with the question at bar.

The regulations promulgated by the Department of Agriculture, and pleaded in the answer of the railway company (Exhibit E, page 26, printed record,) say that the same are issued under section seven of this act of Congress, and notifies the transportation companies that the contagious and infectious disease known as splenic, or Southern fever, exists in certain territory therein described, and warning them that from March 1 to December 1, 1892, *no* cattle are to be transported from said area to any portion of the United States north or west of the line named, except by rail for immediate slaughter, and when transported for that purpose to be under certain named restrictions.

The Kansas Statute counted upon is found in the laws of 1891, at page 346, and is chapter 201 of the Laws of 1891. The section counted upon, and the only one involved in this discussion, is section three, and is as follows:

"Any person who shall drive, ship or transport, or cause "to be shipped, driven or transported into or through any "county in this State, any cattle liable or capable of communi- "cating Texas, splenic, or Spanish fever to any domestic cattle "of this State, shall be liable to any person or persons injured "thereby for all damages that they may sustain by reason "of the communication of said disease of Texas, splenic or "Spanish fever, to be recovered in a civil action in any court "of competent jurisdiction, and the parties so injured shall "have a first and prior lien to all other liens for such damages "on the cattle communicating the disease of Texas, splenic, "or Spanish fever."

The only place where the two acts occupy common ground is in section six of the United States Statute and section three of the State act. We venture with great confidence to predict that counsel for plaintiff in error will be utterly unable to point out any conflict. These two acts lie parallel. They supplement each other. They seek to accomplish the same end. Breaking the one is a breach of the other. Under section six no railroad company within the United States is permitted to transport from one State to another, live stock affected with any contagious, infectious, or communicable disease. Section three steps in and, furthering the same purpose, forbids the transportation of the same class of cattle into or through any county in Kansas. This is cooperation, not conflict, and is in perfect accord and pursuance with the invitation extended to the States found in the United States Statutes and accepted by the State of Kansas by act of its Legislature—chapter five, section one, Laws of 1884.

Counsel also claim that in some illy-defined way the railway company was protected by the order of the Secretary of Agriculture, which was pleaded in the answer. We are at a loss to see how this contention can be maintained. That order is issued under the authority found in section seven, and was a notice that the area mentioned was an infected one This notice was necessary in order to fix the criminal liability imposed by that section and could not, nor did it, assume to in the least moderate or interfere with the prohibition contained in section six. It contained no permission, directly or remotely, for infected or infectious cattle to be shipped from

one State to the other, even though they came from without the proscribed limit—except for immediate slaughter, and the railway company in this case well knew that that was not the purpose of this shipment—and if it had, it would have been to that extent wholly unauthorized and void.

IV.

The Kansas laws involved were a proper and warranted exercise by the State of its inherent police power.

Outside of the District of Columbia and the territories, all proper police power is inherently resident in the states, and in no sense does it belong naturally to, nor in any just sense has it ever been vested in, Congress, nor in the Department of Agriculture. In this connection we refer to the following:

U. S. vs. DeWitt, 9 Wall., 41, 45.
License cases, 5 How., 631.
Barbier vs. Connelly, 113 U. S., 27.
Passenger cases, 7 How., 283.
License Tax cases, 5 Wall., 470.
U. S. vs. Reese, 92 U. S., 214.
U. S. vs. Cruikshanks, 92 U. S., 542, 551.
Slaughter House cases, 16 Wall., 62.
Civil Right cases, 109 U. S., 3.
Tiedeman's Lim. of Police Power, §202.
Munn vs. Illinois, 94 U. S., 113.
Thorpe vs. Rutland R. R. Co., 27 Vt., 149.
Yeasel vs. Anderson, 58 Ills., 254.
Doyle vs. Cont'l Ins. Co., 94 U. S., 535, 541.

In this last case it is said:

"Full power and control over its territories, its citizens, and its business, belong to the State. * * * * * * * The State, * * * * * except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world.

"The power to prescribe regulations to protect the health of the community and prevent the spread of disease is incident to all local municipal authority, however much such regulation may interfere with the movements of commerce."

Gloucester Ferry Co. vs. Penna., 114 U. S., 196.

"It may also be admitted that the police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime or pauperism or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots and lunatics and persons likely to become a public charge, as well as persons affected by contagious or infectious diseases,—a right founded in the sacred law of self-defense. The same principle, may also be conceded, would justify the exclusion of *property* dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive."

Hannibal & St. Jo. R. R. Co. vs. Husen, 95 U. S., 465.
Kemmish vs. Ball, 129 U. S., 217, 221.

"The purpose of the statute (*i. e.*, the Statute of Missouri, very similar to the quoted section of Laws of 1891,) is not to interfere with the commerce between the states, but to exclude from the State and to prohibit the importation thereto of cattle having contagious or infectious diseases, and therefore exclusively for the protection of the property of the citizens of this State against the acts of such persons as use their property in such a way as is dangerous and detrimental to the interests of others.

Grimes vs. Eddy, 28 S. W. Rep., 756.

And again in the same case:

"The power to prevent the importation of diseased or infected cattle into the State and the power to prevent the transportation of said cattle through the State over the great thoroughfares—railroads,—or by river, rests upon very different principles. The one, as has been seen, may be regulated or prohibited by the State in the exercise of its police power, while the other is a plain regulation of interstate commerce, a regulation extending to prohibition."

In Burdick vs. People, 149 Ill., 608, the Supreme Court of that State says:

The deposit in Congress of the power to regulate commerce between the States was not intended to deprive the States of their police power. Under this police power a State

may legislate to promote domestic order, morals and safety; to protect the lives, limbs, quiet and property of all persons within the State; to secure the general comfort, health and prosperity of the State; to prevent crime, pauperism, disturbance of the peace, and all forms of social evils. * * * But many acts of a State may affect or influence commerce without amounting to a regulation of it. State legislation, which is not an obstacle to interstate commerce, and imposes no burden on it, and which comes within a proper exercise of the police power, is not unconstitutional as infringing upon the powers of Congress."

This court, in Mayor of N. Y. vs. Wilson, 11 Peters, at page 139, says:

"A State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That,by virtue of this, it is not only the right but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restricted in the manner just stated. That all these powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive."

V.

If this Court has technical jurisdiction and a Federal question is involved, such Federal question was properly decided by the State Supreme Court; and its judgment should be affirmed.

The argument under this head has been anticipated in the former portions of this brief, and to the extent that such argument is relevant and material under this point, the same is made part hereof by reference, to avoid repetition.

The common law, which we invoke as inherent and manifest in the record, and the Kansas Statutes quoted, com-

pletely justify the judgments complained of. The judgments, in favor of the plaintiff Haber and the one hundred and forty-five defendants who lost cattle by this pestilence through the gross negligence and wrong of the railway company, are authorized both by the common law and the Kansas Statute.

It is popularly believed by the profession that for every legal right denied there is somewhere an appropriate remedy, and that every grevious wrong demands and warrants a redress.

It is not questioned but that the law of Kansas authorized and required these judgments. We believe that we have shown, under point four (4) of this brief, that such law was a proper exercise of the inherent police power of the State. And it would seem that there is now no such general exaltation of the power or rights of the states, or belittling of the authority of the general government, as to call upon the courts, either State or Federal, to strain a point against the one or in favor of the other; but rather that a liberal construction should be adopted in the interest of local self-government and the promotion and protection of local interests. And that the recognized rights of sovereign States to manage their own internal and police affairs might not be interfered with.

The injuries were all occasioned in Kansas, the wrong done in Kansas, and it would not seem improper that a corporation created by the laws of Kansas and in part, at least, for the benefit of its citizens, should respond in damages to those same citizens when it had violated the police laws of that State to their injury. Had persons resident in another State lost these cattle through the negligence of the railroad company and sought redress in the United States Circuit Court at Topeka in a law action, that Court would certainly have administered the Kansas law as we show it to be, and, upon it as well as the common law, have rendered the judgments set out in the record. It is nowhere suggested that the parties who have suffered these damages had any other redress or any other forum.

Confidently believing that there is no conflict between the Federal and State laws, as demonstrated in the third (3)

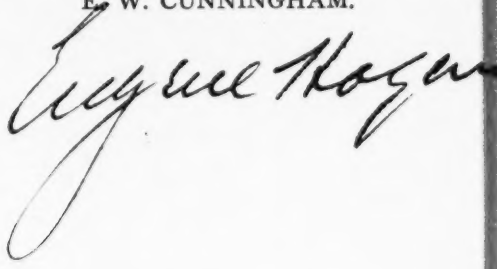
point of this brief, and that no constitutional provision, law, treaty or authority can be cited in criticism of the conclusion reached by the Supreme Court of Kansas, we ask that the writ of error be dismissed, or the judgment of the State Court be affirmed.

The writ of error in this case has long delayed the proceedings upon these judgments to the great harm and cost of these defendants in error, and we think it appears to have been sued out merely for delay. We therefore ask that proper damages be awarded under rule 23, and the case of West Wisconsin Railway Co. vs. Foley, 94 U. S., 100.

We have been unable up to the time of closing this brief to obtain an inspection of the brief of plaintiff in error, and hence are here unable to make a specific answer thereto.

Respectfully submitted on behalf of all of the defendants in error, except Farrington & Lantry.

J. JAY BUCK.
E. W. CUNNINGHAM.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Plaintiff in Error,*

vs.

CHARLES HABER, *et al., Defendants in Error.*

No. 268.

BRIEF AND ARGUMENT FOR FARRINGTON AND LANTRY, DEFENDANTS IN ERROR.

The statement of the case contained in the brief for the other defendants in error is adopted as amply sufficient to advise the Court of the nature of the controversy.

The parties to the record are so numerous, and the interest of these defendants in error so considerable, that we venture to present a separate argument in their behalf.

I.

ON THE RECORD THE WRIT OF ERROR SHOULD BE DISMISSED BECAUSE THE QUESTIONS OF CONFLICT BETWEEN THE FEDERAL AND STATE STAT-

UTES, AND THE UNCONSTITUTIONALITY OF THE LATTER, WERE NOT STATED, OR MADE, IN THE STATE COURTS IN PROPER TIME.

The argument for the other defendants in error, that the decision of the State Court is broad enough to sustain the judgment under the common law, found on page 21 *et seq.* of their brief, is irrefragable.

It is also urged that the record affirmatively shows that the questions which the plaintiff in error now asks a review of were raised too late in the progress of the case through the State Courts to entitle it to ask this court to decide them.

The fourth paragraph of the answer alleges in substance—

That the Secretary of Agriculture promulgated certain regulations concerning cattle transportation conformably to Section 7 of the Act of Congress of May 9, 1894, and to the Act of Congress approved March 3, 1891, by which all restrictions in such transportation were removed in that part of the United States where the Secretary had concluded Texas fever did not exist among cattle, and that the cattle in question were shipped from a point north of the locality where such disease existed. (Tr. p. 21.)

In the instructions asked by the railway company in the trial court, the fact of the issuance of

these regulations by the Secretary of Agriculture is recited (p. 263); and the court was requested to declare as matter of law that the Secretary was required by said Act of Congress to establish such rules, and to certify them to the executive authorities of the States and invite their co-operation in the enforcement thereof; to declare as matter of law that the State of Kansas had by statute accepted the provisions of these acts of Congress, and had been co-operating with the federal authorities under such regulations for the suppression and extirpation of diseases among domestic cattle; also that said regulations had become a part of the law of Kansas upon this subject. (Tr. p. 264.)

The plaintiff in error also requested an instruction that as the shipment of the cattle in question was an act of interstate commerce, under the authority of the United States, that the rules and regulations established by the Secretary of Agriculture were "paramount to the authority of the State of Kansas, and, in case of a conflict between the rules and regulations of the United States and those of the State in relation to this cattle shipment, the State laws and regulations must give way." (Tr. p. 266.)

The case then went to the Supreme Court of

the State, and in the petition in error filed therein by the Railway Company, the only reference made to the questions mooted here are these:

"34. The said court erred in not giving to the jury each and every one of the special instructions requested by the plaintiff in error, (one of the defendants below). (Tr. p. 5.)

"49. The said court erred in refusing to instruct the jury that the shipments of cattle were interstate commerce, and controlled by the laws and regulations of the Department of Agriculture of the United States." (Tr. p. 6.)

So far it can hardly be claimed that any assertion of conflict between the Federal and State Statutes, or of the unconstitutionality of the latter has been raised in such a way as to entitle the plaintiff in error here to a decision of either of such questions. There is no averment in the answer of conflict or of unconstitutionality. On the other hand, the tenor of the answer is directly contrary to such a position. It is drawn upon the theory that the Federal and State Statutes were in harmony, and that the authorities of the general and State governments had been and were co-operating in the enforcement of the law along parallel lines. Indeed, it is asserted by the plaintiff in error in one of the instructions asked of the trial court that the

regulation of the Department of Agriculture had been made a portion of the governing law of the State of Kansas by an act of its Legislature. A claim of immunity from liability to the defendants in error was predicated upon this assertion, and the further allegation that an officer of the United States had been authorized by the State authorities to issue permits for the transportation into Kansas of the cattle in question.

The first place in the record where a claim that the law of Kansas is unconstitutional or in conflict with the Federal Statutes is in the petition for a rehearing in the State Supreme Court. (Tr. pp. 298–320.) And the first specific claim that the statute conflicts with the third subdivision of Section 8 of Article 1 of the Constitution of the United States is in the petition for the writ of error. (Tr. p. 322.)

This was too late.

In the case of *California Powder Works v. Davis*, 151 U. S. 389–393, it is said that the question must have been presented to and decided by the Supreme Court of the State, and that such a claim when first made in the petition for a writ of error comes too late.

In *Fowler v. Lamson*, 164 U. S. 252, it is held

that it must appear in the record that a Federal question was raised in the State Court before the entry of final judgment. Otherwise this court is without jurisdiction.

In *Simmerman v. Nebraska*, 116 U. S. 54, this language is used:

"It nowhere appears from this record, . . . that any Federal question was actually presented for consideration, or in any way relied on, before the final judgment from which the writ of error has been taken. Such being the case, we cannot take jurisdiction. *Detroit Railway Co. v. Guthard*, 114 U. S. 134; *Brown v. Colorado*, 106 U. S. 95. The fact that, after the final judgment, and in the petition for a writ of error to this court, which seems to have been treated also as a petition for rehearing, a Federal question was presented, is not enough. It was so decided in *Susquehanna Boom Co, v. West Branch Boom Co.*, 110 U. S. 57. As we said in that case: 'We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment on a petition for rehearing. Such a petition is no part of the record on which the judgment rests.'"

In *Missouri Pacific Railway Co. v. Fitzgerald*, 160. U. S. 556, the following quotation from the opinion in *California Powder Works v. Davis*, *supra*, is made the basis of that decision:

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

And in *Chicago* etc. *Rly. Co. v. City of Chicago*, 164 U. S. 454, reference is made to the Revised Statutes, Section 709, and it is held that:

"This court has no authority to review the final judgment of the highest court of a State in which the decision of the case could be had, and to determine whether that judgment is in derogation of a title, right, privilege, or immunity, protected by the Constitution of the United States, unless the party against whom such judgment was rendered, 'especially set up or claimed' such right under that instrument."

It is apparent from the foregoing references to the record that the plaintiff in error did not specially set up or claim in the State Courts, or either of them, any right under the Constitution of the United States, except as it may be inferred from the allegation that it was a common carrier of interstate traffic; nor did it claim that there was any conflict between the Federal and State legislation

prior to the filing of the petition for a rehearing in the Supreme Court of the State. It will be noticed that the prayer for instructions in the *nisi prius* court did not ask that court to declare a conflict between the National and State Statutes. It was a request for an instruction that the shipment of cattle in question was an act of interstate commerce, and that as to such shipment the authority of the United States was paramount to that of the State; but it left the question as to whether there was any such conflict to be decided by the jury.

As has been pointed out, the first claim of conflict made by the Railway Company is at page 304 of the record, and this was only by way of argument for a rehearing in the Supreme Court of the State. There it is plainly claimed that the Kansas Statute "was abrogated so far as it undertakes to legislate as to interstate shipments of cattle." And it is also claimed or argued, pages 308–309, that the decision of the Supreme Court struck down the Federal law and denied the authority of the general government to make regulations which would have the effect to abrogate the Statute of the State.

In the petition for the allowance of a writ of error it is averred that the right of the plaintiff in error to ship and transport cattle as a common car-

rier of interstate commerce from north and west of the government quarantine line was denied by the decision of the State Court. It is also averred that certain Statutes of Kansas that prohibit the shipment or transportation into the State of Kansas of cattle from south of the south line of Kansas from February 1st to December 1st of any year, are in conflict with certain acts of Congress and regulations of the Department of Agriculture, and with the Commerce clause of the Constitution; and also with the second subdivision of Article 6 of the Constitution declaring that the Federal Constitution and Statutes shall be the supreme law of the land. It is also stated in said petition that the decision of the State Court was against the claim of unconstitutionality, and against the claim of the plaintiff in error of the right which it had as a common carrier of interstate commerce to transport the cattle in question in the manner it did transport them. And that said decision was further to the effect that the Secretary of Agriculture was without the power to make a regulation as to interstate commerce which would abrogate and annul the laws of Kansas in any degree.

But it is so overwhelmingly settled by the authorities above quoted, and by many others which

it would be mere pedantry to recite, that this claim came too late, that we forbear further discussion of the question, except to call attention to the last expression of the court, made November 1st, 1897, in *Miller v. Cornwall Rld. Co.*, (18 Sup. C. Rep. 34.) The first paragraph of the syllabus is as follows:

"A writ of error to a State Supreme Court cannot be sustained on the ground that the validity of the State Statute, under the Constitution of the United States, was drawn in question, where this ground of invalidity was not set up in the State Courts, except in a motion for a rehearing filed in the State Supreme Court long after it had affirmed the judgment below."

And in the body of the opinion the Court uses this language:

"And under Section 709 of the Revised Statutes, if the ground on which the jurisdiction of this Court is invoked is that the validity of a State law was drawn in question as in conflict with the Constitution of the United States, and the decision of the State Court was in favor of its validity, this must appear on the face of the record, before the decision below can be re-examined here. *Dibble v. Land Co.*, 163 U. S. 63, 70.

The record in this case discloses no attempt to question the validity of the particular statute, in the State Court, as in contravention of the Federal Constitution, unless in the points requested to be

given in the trial Court, and the refusal to give them ; for even if it could be held that such question was raised on the application for reargument, nearly a year after the judgment of the Common Pleas was affirmed by the Supreme Court, the suggestion came too late. *Texas & P. Rld. Co. v. Southern Pac. Co.*, 137 U. S. 48; *Leober v. Schroeder*, 149 U. S. 580; *Pim v. City of St. Louis*, 165 U. S. 273."

THE DECISION OF THE STATE COURT WAS BROAD ENOUGH TO SUSTAIN THE JUDGMENT UNDER THE COMMON LAW.

This has been argued in the brief of our associates, and we only notice it for the purpose of calling attention to the later decisions of this court on that point. The cases even go farther than contended for, as they hold that if the facts are adequate to determine the controversy, and broad enough to maintain the judgment independent of any Federal question, this Court is without jurisdiction, although the State Court may have decided such Federal question.

Eustis v. Bolles, 150 U. S. 361.
Connecticut v. Woodruff, 153 U. S. 689.
Hammond v. Ins. Co., 150 U. S. 633.

THE CONCLUSION OF THE STATE COURT ON THE FACTS IS FINAL.

The assignments of error found in the brief for plaintiff in error may be thus grouped.

Nos. 3, 4 (pp. 51 to 56 of brief) and No. 11 (pp. 68 to 69, brief), each alleges that the State Court erred in the admission of evidence. No. 5 (pp. 61 to 67) alleges like error as to a matter of practice. All these assignments and that part of the opposing argument applicable thereto (especially that under sub-heads IV, V and VI, p.p. 128 to 143 inclusive of brief) all refer to questions which this court, in such a case as this, will not consider.

Assignments Nos. 1 and 2 (p. 51 of brief) simply allege error in the rendition of the judgment. No. 8 (p. 57) alleges error in not holding the Kansas Statute void as in conflict with the Commerce clause of the Constitution, and with Sec. 2, Art. 6 of the Constitution, with the Animal Industry Act and its addendum of March 4, 1891; with the Act of Congress and the amendment thereto regulating commerce, and with the Act of June 15, 1866, "to facilitate commercial, postal and military communication among the several states." This is absolutely the first mention of the last named act.

That in a case like this, this court cannot consider the evidence, and that the findings of fact by

the State Court are conclusive, is settled by abundant authority.

In *Egan v. Hart*, 165 U. S. 188, it ts said:

"The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the Supreme Court of the State of Louisiana. On error, however, to a State Court, this court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding. *Dower v. Richards*, 151 U. S. 658; *Bartlett v. Lockwood*, 160 U. S. 386; *Stanley v. Schwalby*, 162 U. S. 255. True it is that in *Dower v. Richards*, the court (referring to the dictum in *Republican River Bridge Co. v. Kansas Pac. Ry.*, 92 U. S. 315-317), treated as open for further consideration the question whether, in chancery cases, the power existed in this court to review the decision of State Courts on both the law and the fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a State Court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in *Dower v. Richards*, and in the subsequent cases above referred to.

"It is likewise settled that on error to the Supreme Court of Louisiana the opinion of that court is to be treated as part of the record, and that it may be examined in order to ascertain the ques-

tions presented, and this court may, for the purpose, not of deciding the facts, but by way of throwing light on the findings, look into the entire record. *Crossley v. City of New Orleans*, 108 U. S. 105; *Gross v. Mortgage Co.*, 108 U. S. 477."

THERE IS NO CONFLICT BETWEEN THE FEDERAL AND STATE STATUTES.

These statutes have been printed in full in the brief for plaintiff in error, and the Animal Industry Act has been admirably digested on pages 24 and 25 of the brief of our associates It seems to be the impression of counsel for the Railway Company that the Secretary of Agriculture has been clothed with authority to legislate in respect to transportation of cattle, and also to regulate interstate commerce in certain respects. This was not at all the object of Congress in passing the Animal Industry law. The question of interstate commerce was no more in the legislative mind at that time than it was when the act creating the Department of Agriculture was passed. The rules and regulations which the Secretary is authorized to make are not to be in force in any State unless the State shall adopt them, and in that event the only provision is that a part of the appropriation may be used for the benefit of the States whose

authorities accept and adopt his suggestions and are willing to co-operate with him in carrying out the purposes of the act.

Section 3 is the first section which deals with cattle otherwise than as objects of study, or for purposes of foreign commerce, or commerce in the District of Columbia. This section has for its exclusive object the extirpation of diseases or the prevention thereof *within the states* which choose to avail themselves of the assistance of the Department of Agriculture. That must be a strange Federal Statute which can operate "as the Supreme Law of the Land" within any State only by the consent of that State. That no such thing was contemplated by Congress as an exclusive regulation of the subject is clearly indicated by the provisions for the co-operation of the States. Co-operation would be impossible if it was the purpose of Congress to exercise a paramount authority, and to abrogate all State laws on the subject. Congress adopted no quarantine system. It authorized the Department of Agriculture to adopt none. It did authorize the proposal of a system for the States to adopt, and directed the Secretary to co-operate with and financially assist the authorities of such States only as should adopt that system. The depart-

ment was given no power to override the State governments, but was only to assist them with their sovereign permission. The regulations paraded by the plaintiff in error show that the Department of Agriculture so understood the law. At every step it recognizes as in full operation the Quarantine Laws of the State, and the authority of the State officers appointed to enforce them. And the statute on its face shows that the provisions of Section 3 were for application everywhere, and had no special reference to interstate commerce. It is plain that Congress had no thought of exercising by that section its power to regulate commerce between the States.

Section 7 requires notice to common carriers of the existence of contagion in any locality, and declares a punishment for the violation of Section 6 *in such infected locality*. It goes no further than Section 3 in the direction which the plaintiff in error is endeavoring to lead this case.

Section 6 prohibits railroad companies from receiving for transportation and from transporting from one State or Territory to another any live stock affected with any contagious, infectious or communicable disease. The *proviso* is that Texas fever shall not be considered such a disease as to

cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto. No penalty is provided for the violation of this section. Its provisions forbid carriers from receiving or transporting diseased cattle *anywhere*, whether in or out of an infected district. The prohibition treats of the condition of the stock, not with the locality of its reception, and broadly declares that diseased live-stock or those capable of communicating disease shall not be the subject of interstate commerce. The single offense created by the act is committed only where, after official notice that a certain district is infected, a carrier, *within such infected district*, *knowingly* receives diseased live-stock for shipment to another State or Territory.

How is the United States to enforce the rules and regulations prescribed by the Department of Agriculture? The Act does not make even a complete defiance of all of them a penal offense; to ignore or violate them puts the offending party in no peril of punishment. If a railroad company receives cattle elsewhere than in a district already declared infected, or if within a district already so declared, it receives them without *knowing* they are actually affected with a communicable disease,

it may carry them to their destination in another State or Territory and unload them there to spread infection, and the hand of the Federal government cannot be outstretched to punish the wrong.

Section 6 limits its naked and toothless prohibition to *the reception and transportation* of the cattle, and Section 7 provides punishment only for knowingly violating Section 6 *within a declared district;* that is, for knowingly receiving within that district a shipment of stock either diseased or capable of communicating disease. Suppose the carrier received them elsewhere, or innocently received them, but infection is discovered in transit —what is to be done? What, in any case, is to be done with the cattle? Section 7, within the limits of its sphere, provides what shall be done with the culprit; but is silent as to the infected stock. What is to be done to prevent the spreading of the infection? Surely a *quarantine* law ought to say something on these subjects, too! But the act contains not a word except that the Secretary of Agriculture is to prepare rules and regulations on the subject. How is the United States to get these rules and regulations obeyed? Obviously in but one way: the States are to adopt and enforce them as State rules and regulations.

This is precisely what is contemplated by Section 3.

The circular offered in evidence is, upon its face, nothing but the notice to carriers provided for by Section 7 and does not even purport to be the rules and regulations to be certified to the State under Section 3; but whatever those rules and regulations may be when adopted by a State, they then become State — not Federal — laws.

Sections 6 and 7, therefore, contain all that Congress has said on this subject, and aside from mere notice to railroad companies, Section 7 alone is penal.

The contention of the Railway Company is, therefore, reduced to this: Section 6 of the Animal Industry law, which prohibits railroad companies and other carriers from receiving for transportation and from transporting from one State or Territory to another any live stock affected with any contagious, infectious, or communicable disease, is competent, and was intended by Congress, to strike a death-blow to all the carefully framed legislation of Kansas designed for the protection of domestic cattle from destruction by the dread disease of Texas fever.

The argument is this: So long as Congress left the inter-state shipment of cattle free by passing no law at all on the subject, the State of Kansas had power to enact the statutes in question; but Congress, in forbidding inter-state commerce in diseased cattle in any part of the United States, has, *ipso jure*, declared these statutes unconstitutional as an unwarrantable interference with inter-state commerce. This is the most complete and rounded *non sequiter* found in legal literature.

In what respect do the Kansas Statutes conflict with the Federal law? The latter only forbids carriers receiving infected cattle for shipment and from transporting them to another State or Territory; the former forbids the bringing of such cattle into the State of Kansas. The statutes operate upon the subject at opposite extremities and can by no possibility operate on the same act, for the act must be done *outside* the State to fall within the Federal Statute and *inside* the State to fall within the Kansas Statute. It is impossible for these statutes ever to reach a point where one must yield to the other. It cannot be seriously claimed that an Act of Congress forbidding the reception or transportation of diseased cattle elsewhere for shipment into this State, and providing a punishment

for knowingly receiving such cattle within an infected district, has the effect of forbidding the State from preventing the introduction into its territory of live-stock capable of spreading a deadly disease among its native cattle. It is inconceivable that the Act of Congress was intended to trammel the States or to prevent them from protecting the property of their citizens from the dreadful scourge of Texas fever.

On the other hand, Congress carefully refrained from enacting provisions which, however inadequate they might prove, could be construed as excluding the States from this legislative domain. It established a bureau to study the subject and propose measures for the States to adopt as their own if they chose; appropriated money to aid the States in enforcing those measures, and lent to the States the assistance of officers provided and paid by the Federal government. That was all. The Kansas legislature so understood it when, at the same session at which it provided for co-operation with the Commissioner of Agriculture, it passed four other laws covering the entire subject of live-stock quarantine: an Act creating the office of State Veterinarian; an Act creating a live-stock sanitary commission; an Act defining a quarantine

ground; and an Act concerning Texas fever in unorganized counties. The legislature certainly did not understand that its co-operating act was a complete surrender of the State's sovereign power concerning matters of internal police regulation.

The question put in *Morgan v. Louisiana*, 118 U. S. 455, has not, therefore, arisen. On the contrary, what was there said as to the provision by the United States of a general system of quarantine abrogating inconsistent State laws proves our argument to be sound. Here Congress found it expedient to commit to the States under their own laws the enforcement of a quarantine system which touches inter-state commerce and deliberately pledged its aid and assistance in the enforcement of such laws by forbidding carriers to receive or transport cattle capable of communicating disease. Such a scheme of co-operation found precedent in Title LVIII: The Public Health: (¶ 4792, *et seq.* Rev. Stat. U. S.: Act April 29, 1878, 20 Stat. L. 37.)

Much is said about certain permits said to have been obtained by the Railway Company before it undertook the transportation of these cattle. The reception or rejection of such permits as evidence by the State Court is not a question which will be

debated here; but it may be well to call attention to the fact that neither the Act of Congress, the regulations of the Department of Agriculture, or the laws of Kansas contemplate the issuance of any such documents. By what authority they were issued, or in what way they can shield the Railway Company from responsibility for its negligence, both common law and statutory, in bringing diseased cattle into Kansas, is not apparent. The Kansas Statute provides only for certificates that the cattle have been kept since the first day of December of the previous year west of the twenty-second Meridian of longitude west from Washington, and north of the thirty-fourth parallel of north latitude. (Laws of 1891, p. 348.)

It is unnecessary to invoke the well settled doctrine that the conflict or repugnance between the Federal and State Statutes must be direct and positive (*Sinnot v. Commissioners of Mobile*, 22 How. 227–243), for there is complete harmony between the legislation of Congress and of the State. There is no disposition to controvert the proposition that the Constitution and laws of the United States are the supreme law of the land, or that in respect of inter-state commerce the authority of Congress is paramount, but it is insisted that this is a question

where it is not only competent for the National and State legislatures to co-operate, but that the danger to be averted and guarded against was one of such magnitude and imminence as to justify and demand such concerted action.

It is not in every respect that the sovereign powers of the Nation and of the States stare each other in the face as jealous enemies. In many respects they commingle and blend for the more perfect protection of the citizen, his liberty and property. As was said by Mr. Justice BRADLEY in his great opinion in the case of *Ex parte Seibold*, 100 U. S. 371-384:

"There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature."

True, this was in a case of claimed conflict between Federal and State legislation as to the election of representatives in Congress, but the principle contended for here, is there so vividly portrayed that we venture still another quotation:

"There is no such conflict between them as to prevent their forming a harmonious system, perfectly capable of being administered and carried out as such." (p. 386.)

AS TO THE ARGUMENT OF OPPOSING COUNSEL THAT THE TRANSPORTATION OF THE CATTLE IN QUESTION WAS INTERSTATE COMMERCE.

There is no disposition to question the fact that a shipment of cattle from Texas to Kansas is interstate in character, and the astonishing thing is that so much space should be wasted on such an elementary proposition. Quotations from Chief Justice Marshall are always instructive; but it smacks somewhat of the kindergarten to argue here that commerce is traffic and intercourse "among the several states."

The authority of *Gibbons v. Ogden*, the accuracy of the definition of commerce made by Mr. Justice Field (then at the zenith of his great mental powers) in *Welton v. Missouri*, and the quotations from other opinions of this court, contained in the opposing brief, are illustrative of the industry and zeal of counsel, but they do not fit the case at bar. The argument deduced from these decisions that from the moment these cattle were tendered for shipment the railway company was exempt from all State law, would inhibit Kansas from preventing the plaintiff in error from transporting into Kansas all the unfortunate victims of yellow fever in New Orleans and Mobile. It would eliminate

from the realm of law the police power of the States. Indeed, this is the precise claim made by the other side. (Page 81 of brief.)

Equally unsound is the astonishing declaration, (page 87) apparently based on a quotation from Cooley's Constitutional Limitations, that the State is excluded from enacting police regulations that in any way affect interstate commerce. Carried to its legitimate conclusion, this argument would prohibit all inspection and quarantine laws, and all statutes for the protection of the life, health and safety of the citizen. No doubt Congress may pass quarantine laws so far as the Constitution gives it power so to do, and doubtless when it does, they will prevail in so far as State laws conflict with them.

It by no means follows, however, as claimed in the opposing brief, that Congress has established a national system of quarantine, or delegated to the Department of Agriculture the power to enforce it. As heretofore seen the object of the act of May 29, 1894, was the investigation of the causes of contagious and infectious diseases among cattle, and an offer of assistance to the States in preventing a spread thereof. True Congress nakedly prohibited carriers of interstate commerce

from receiving or transporting diseased cattle, and made it a crime for them to knowingly receive or transport such diseased cattle after notification that such disease existed in a certain locality. But the labored argument for the plaintiff in error fails to disguise the fact that the plan of Congress was one of co-operation with the States. True, it was made the duty of the Department of Agriculture to prepare rules and regulations for the suppression and extirpation of the diseases mentioned in the Act, but it was left without authority, except to certify its rules and regulations to the executive authorities of the States, and it is plainly the meaning of Congress in Section 3 that such regulations should be without force unless adopted and enforced by the States. Suppose an agent of the plaintiff in error was admittedly guilty of a violation of a regulation of the Department, in what way could he be prosecuted or punished; and if an attempt was made in that direction, how indignantly counsel would resent such an unwarranted interference with the liberty of the citizen; and their indignation would be well founded for such an act could not fall within the purview of Section 7, or any other enactment of Congress. The sophistry that such a regulation becomes a part of the Act or anything more than a

mere *brutum fulmen* would be then made apparent.

Following the argument of the other side (p. 95) it may be here observed that it is a matter of no consequence whatever whether Section 6, so far as carriers are concerned, is to have the word "knowingly" read into it. The only matter of importance here is, that in that section and in Section 7 are found the only commands of Congress to carriers touching the transportation of live stock affected with contagious, infectious or communicable diseases. And with those provisions the Department of Agriculture has nothing to do except to notify carriers of the presence of diseases treated of in the Act in certain localities.

It is true that this action is not predicated on the Act of Congress, and that the defendants in error do not claim the right to recover by virtue thereof. But if they did would it be any truer that carriers are exempt from liability growing out of their negligent acts in spreading this disease simply because Congress has authorized an investigation of diseases affecting live stock, has required one of the officers of the general government to delimit those parts of the country in which such diseases exist, and notify carriers thereof. The corollary of this argument is that if the Secretary of Agriculture

should neglect his duty and fail to give carriers notice, or if Congress had omitted this provision from the Act, then diseased cattle could be transported anywhere and everywhere as the cupidity and greed of carriers might dictate without responsibility to anyone. It will be a sorry day for owners of live stock when this court holds that cattle grazed on a range partly within and partly without the quarantine line fixed by the Secretary of Agriculture, and in a condition which told every observer that they were capable of communicating Texas fever, may be transported by a carrier (cognizant of these facts), with absolute immunity from responsibility. No more stinging parody was ever penned than that of counsel (p. 99) as to the bitter experience of cattle owners in the Western States with this disease. They say that this experience taught the lesson that the subject could only be controlled by a full, complete and comprehensive system of national quarantine; and in response thereto Congress passed the Animal Industry law. They say that this complete system only required the Secretary of Agriculture to establish a quarantine line, and to notify the plaintiff in error that Texas fever existed south and west of that line, and because in the transpor-

tation of these cattle (which were undoubtedly diseased), a permit unknown to the law was obtained that the men whose cattle died by the default of the plaintiff in error must suffer this loss. A wonderful system this, which at the same time strikes down all State quarantine statutes, and exempts the plaintiff in error from all necessity of ordinary care in the transaction of its business.

THE KANSAS LAWS WERE A LEGITIMATE EXERCISE BY THE STATE OF ITS POLICE POWER.

In addition to what has been said in the brief for the other defendants in error, it may be well to briefly advert to a few other considerations and decisions on that question.

In *City of New York v. Miln*, 11 Pet. 102, an Act of the State of New York which inflicted a penalty upon the master of a vessel arriving from a foreign port who neglected to report to the mayor or recorder an account of his passengers, was held to be not a regulation of commerce but of police and not in conflict with the Constitution of the United States. The opinion discusses many questions but the stress of the decision is placed upon what were termed "impregnable positions," and the court speaks as follows:

"That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained; in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained, and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive." (p. 139.)

In discussing the subject the opinion proceeds:

"Let us compare this power with a mass of power, said by this court in *Gibbons v. Ogden*, 9 Wheat. 1, not to be surrendered to the general government. They are inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, &c. To which it may be added, that this court, in *Brown v. The State of Maryland*, 12 Wheat. 419, admits the power of a State to direct the removal of gunpowder, as a branch of the police power, which unquestionably remains, and ought to remain with the States.

"It is easy to show that if these powers, as is admitted, remain with the States, they are stronger examples than the one now in question. The power to pass inspection laws involves the right to examine articles which are imported, and are, therefore, directly the subject of commerce; and if any of them are found to be unsound, or infectious, to cause them to be removed, or even destroyed. But the power to pass these inspection laws is itself a branch of the general power to regulate the internal police.

"Again, the power to pass quarantine laws operates on the ship which arrives, the goods which it brings, and all persons in it, whether the officers and crew, or the passengers; now the officers and crew are the agents of navigation; the ship is an instrument of it, and the cargo on board is the subject of commerce, and yet it is not only admitted that this power remains with the States, but the laws of the United States expressly sanction the quarantines, and other restraints which shall be required and established by the health laws of any State; and declare that they shall be duly observed by the collectors and all other revenue officers of the United States." (p. 142.)

* * * * * * * *

"We think it as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or

from a ship, the crew of which may be laboring under an infectious disease." (p. 143.)

In *Prigg v. Pennsylvania*, 16 Pet. 539, it is said on page 625, by STORY, J.:

"To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States, in virtue of their general sovereignty. That police power extends over all the subjects within the territorial limits of the States, and has never been conceded to the United States."

This power rests on the maxim: "So use your own that you injure not another's property." It is grounded, like self-defense, on the law of necessity.

2 Hares' Am. Con. Law, pp. 760, 784.
Palairet's Appeal, 5 Am. Rep. 450.

No completely accurate definition of the police power has yet been given. The courts seem disposed to deal with particular cases as they arise, rather than undertake an abstract definition of the term. Most of the books rather describe the phrase than define it. Cooley says:

"The police power of a State, in a comprehensive sense embraces its whole system of internal regulation, by which the State seeks not only to pre-

serve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of the rights by others." (Con. Lim., 5th ed. 706.)

Tiedeman, in his work on the Limitation of the Police Power, pages 289–290, states that this "power must, when exerted in any direction, be confined to the imposition of those restrictions and burdens which are necessary to promote the general welfare—in other words, to prevent the infliction of a public injury."

It is useless, however, to depart from the deliverances of this court. It would be interesting to trace the course of the decisions on this subject, but space forbids. The case of *Kimmish v. Ball*, 129 U. S. 217, seems absolutely conclusive of the questions which it is claimed this court should pass on. That case involved the validity of the following statute of Iowa:

Section 4058: "If any person bring into this State any Texas cattle, he shall be fined not exceeding $1,000, or imprisoned in the county jail not exceeding 30 days, unless they have been win-

tered at least one winter north of the southern boundaries of the States of Missouri and Kansas; *Provided*, That nothing herein contained shall be construed to prevent or make unlawful the transportation of such cattle through this State on railways, or to prohibit the driving through any part of this State, or having in possession, any Texas cattle, between the first day of November and the first day of April following."

Section 4059: "If any person now or hereafter has in his possession, in this State, any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large, and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished as is prescribed in the preceding section."

The action was based upon this latter section. The petition of the plaintiff alleged that in June, 1885, the defendants were the owners of and had in their possession and under their control a herd of Texas cattle which had not been wintered north of the south boundaries of Missouri and Kansas, and which were purchased at or near Fort Smith in Arkansas; that said cattle, while in the possession and under the control of the defendants, were allowed to run at large in Harrison County, Iowa, and that said cattle were infected with Texas fever which was spread and disseminated by them among the cattle of the plaintiff, whereby they sickened

and died to his damage of $5,000. To this petition the defendant demurred on the grounds, first, that Sections 4058 and 4059, above quoted, are in conflict with Section 8, Article 1, Constitution of the United States, in that the legislature of Iowa undertook by them to regulate and interfere with interstate commerce; and, second, that the sections are in conflict with Section 2, Article 4, Constitution of the United States, relative to the privileges and immunities of the citizens of the several States. The demurrer was heard in the Circuit Court, and the two judges were opposed in opinion. The plaintiff elected to stand on his petition, and judgment was entered for the defendant, sustaining the demurrer according to the opinion of the presiding judge.

Mr. Justice FIELD, after discussing the malady of Texas fever, and ascertaining that cattle coming from southern latitudes are infected with a contagious and dangerous fever, and stating that the legislation in question was founded on these notorious facts, and reciting the language of Section 4059, uses these words:

"We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate

interstate commerce. * * * Nor does the case of *Railroad Co. v. Husen*, 95 U. S. 465, upon which the defendant relies with apparent confidence, have any bearing upon the question presented. The decision in that case rested upon the ground that no discrimination was made by the law of Missouri in the transportation forbidden between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion. 'It is noticeable,' said the court, 'that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not.' Page 469. It interpreted the law of Missouri as saying to all transportation companies: 'You shall not bring into the State any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not; no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Page 473. Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a State may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. Page 472. No attempt was made to show that all Texas,

Mexican or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. *Certainly all animals so infected may be excluded from the State by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised. Railroad Co. v. Husen* gives no support to the contention of the defendant. There is no necessary dependence of the provisions of Section 4059, imposing a civil liability, upon those of Section 4058; so that the one may not stand without the other. If the criminal liability created by Section 4058 is open to doubt, which we do not affirm, the civil liability may remain for the damages caused by the willful conduct designated in Section 4059. *Packet Co. v. Keokuk*, 95 U. S. 80.; *Allen v. Louisiana*, 103 U. S. 80. * * * The section in question is not u constitutional by reason of any conflict with the commercial clause of the Constitution."

Reliance is placed on *Railroad Co. v. Husen*, but an attentive reading of the opinion in that case shows that the court construed the statute of Missouri there in question as

"A plain regulation of interstate commerce, a regulation extending to prohibition." (p. 469.)

The court further says:

"That the transportation of property from one State to another is a branch of interstate commerce is undeniable, * * * The Missouri Statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power,—that of destruction." (pp. 469–470.)

The cases of *Henderson v. Mayor*, etc., 92 U. S. 259, and *Chy Lung v. Freeman*, 92 U. S. 275, involved no question of quarantine, and simply deny the validity of State legislation, professing to be an exercise of police power, but which really acted directly and discriminatively on international commerce.

Proceeding to later expositions of this doctrine by this court, it is found that the case of *Sentell v. New Orleans & E. R. Co.*, 166 U. S. 698, fully sustains our position. In that case it was held that even if dogs were property in the fullest sense, they would still be subject to the police power of the State; and that a State Statute providing that no dogs shall be entitled to the protection of the law unless placed upon the assessment rolls, and limiting any recovery by the owner for their killing and injury to the value fixed by himself for the purpose of taxation, is within the police power

of the State. In the course of the opinion Mr. Justice BROWN says:

"That a State in a *bona fide* exercise of its police power may interfere with private property, and even order its destruction, is as well settled as any legislative power can be which has for its object the welfare and comfort of the citizen. For instance, meats, fruits, and vegetables do not cease to become private property by their decay, but it is clearly within the power of the State to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing, but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without recourse against such authorities for the trespass. *Bowditch v. Boston*, 101 U. S. 16; *Mouse's case*, 12 Coke, 63; *Governor* &c. *v. Meredith*, 4 Tenn. R. 794, 797; *Stone v. Mayor* &c. 25 Wend. 157; *Russell v. Mayor* &c. 2 Denio. 461.

"Other instances of this are found in the power to kill diseased cattle, to destroy obscene books or pictures, or gambling instruments; and in *Lawton v. Steele*, 152 U. S. 133, it was held to be within the power of the State to order the summary destruction of fishing nets, the use of which was likely to result in the extinction of valuable fisheries within the waters of the State."

In *New York &c. v. New York*, 165 U. S. 628, a Statute of New York regulating the heating of steam passenger cars and directing guards and guard posts to be placed on railway bridges and trestles and the approaches thereto, is held to be constitutional, although the cars may be employed in interstate commerce. It was claimed there, as here, that the State legislation in question was in conflict with the Commerce clause of the Federal Constitution; but Mr. Justice HARLAN, speaking for the court, after citing many cases, sustained the validity of the Statute as a proper exercise of the police power of the State, although it incidentally affected commerce among the States and with foreign nations. He says:

"It was clearly competent for the State of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that State by stoves or furnaces kept inside the car or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the State must yield to the acts of Congress passed in execution of the powers conferred upon it by the Constitution (*Gibbons v. Ogden*, 9 Wheat. 1–211), the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not, of itself and without legislation by Congress, impair the authority of the States to es-

tablish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people. The statute in question had for its object to protect all persons traveling in the State of New York on passenger cars moved by the agency of steam against the perils attending a particular mode of heating such cars. * * * Why may not regulations to that end be made applicable, within a State, to the cars of railroad companies engaged in interstate commerce as well as to cars used wholly within such State? * * * The statute in question is not directed against interstate commerce. Nor is it within the meaning of the Constitution, a regulation of commerce, *although it controls, in some degree, the conduct of those engaged in such commerce.*"

After noticing a suggestion by counsel that a conflict between State regulations in respect to heating passenger cars used in interstate commerce would make safe and rapid transportation impossible, the learned justice says:

"These possible conveniences cannot affect the question of power in each State to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each State has plenary authority within its territorial limits to provide for the safety of the public according to its own views of necessity and public policy, and so long as Congress deems it

wise not to establish regulations on the subject that would displace any inconsistent regulations in the States covering the same ground."

And noticing the act of June 15th, 1866, (imported into this case for the first time in the brief), it is held that this statute has no bearing on the question before the court, and that the existence of that statute does not interfere in any degree with the enactment by the State, of laws having for their object the personal security of passengers while traveling within their respective limits from one State to another on cars propelled by steam.

The "universality of its presence" has always been recognized; as has the doctrine that in our constitutional system this power has been left with the individual States.

United States v. Dewit, 9 Wall, 41.
Slaughter House Cases, 16 Wall, 36, 62.
Field, J., Dissenting Opinion, 87.
Gibbons v. Ogden, 9 Wheat. 203.

In *Barbier v. Connolly*, 113 U. S. 27, it is said that "the power of the States over police regulations is supreme."

After discussing the matter at some length, Judge COOLEY says:

"Numerous other illustrations might be given of the power in the States to make regulations

affecting commerce, which are sustainable, as regulations of police. Among these, quarantine regulations and health laws of every description will readily suggest themselves. Citing remarks of GRIER, J., in License Cases, 5 How. 632, and License Tax Cases, 5 Wall, 462.

Con. Lim. (2d ed.) 584.

Undoubtedly Congress may establish police regulations in its constitutional fields of action, but it cannot, and has not, attempted to interfere with the States in the matter of excluding contagious and infectious diseases dangerous to life and property. Nor has Congress, by the exercise of its paramount and exclusive authority over interstate commerce the power to say, because a carrier rests under the duty of transporting live stock between the States, that such carrier and such commerce is not subject to the police power of the States so far as necessary to preserve the persons and property of its citizens from the ravages of disease. To do so would be to deny to the States the right of self-defense.

This is the reason why in *Robbins v. Shelby, Taxing District*, 120 U. S. 489, this court was careful to limit its language by declaring that "the only way in which commerce between the States can be legitimately affected by State laws is

where, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property."

It naturally follows that a State may pass laws incidentally affecting interstate commerce, provided such laws *do not discriminate against such commerce, and are not inconsistent or in conflict with Acts of Congress.*

Wilson v. Blackbird Etc. Co., 2 Pet. 245.
Sherlock v. Alling, 93 U. S. 99.
Stone v. Farmers Loan & Trust Co., 116 U. S. 307, 333.

Hennington v. Georgia, 163 U. S. 299, holds that a State Statute making it a misdemeanor to run a freight train in the State on the Sabbath day is a regulation of internal police and not of commerce in its effect on a train of interstate freight.

Extracts from the opinion by HARLAN, J.:

"So, also, quarantine laws of every description, if they have real relation to the objects named in them, are to be referred to the power which the States have to make provision for the health and safety of their people.

"Local laws of the character mentioned have their source in the powers which the States reserved, and never surrendered to Congress, of pro-

viding for the public health, the public morals and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce, simply because for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The Statute of Georgia is not directed against interstate Commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate.

"We are of the opinion that such a law, although in a limited degree affecting interstate Commerce, is not, for that reason, a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate Commerce, but, considered in its own nature, is an ordinary police regulation, designed to secure the well-being and to promote the general welfare of the people within the state by which it was established."

The Court quotes from :

Wilson v. Marsh Co., 2 Pet. 245, 251, 252.
Gilman v. Philadelphia, 3 Wall. 713–729.
Cooley v. Board, 12 How. 299–320.
Owners of Brig James Gray v. Owners of Ship John Fraser, 21 How. 184–187.
R. R. Co. v. Fuller, 17 Wall. 560–567–570.
R. R. Co. v. Husen, 95 U. S. 465–470–473.
Morgan v. Louisiana, 118 U. S. 455–463–465.
Smith v. Alabama, 124 U. S. 465–474–479–482.
Sherlock v. Alling, 93 U. S. 99.
Nashville Ry. Co. v. Alabama, 128 U. S. 96–99–101.

The opinion says that *Wilson v. Marsh Co.* 2 Pet. 245, though often criticized, is still authority in this Court.

See *Pound v. Turck*, 95 U. S. 459–463. That case upholds the Statute of Delaware authorizing the construction of a dam across a navigable creek up which the tide flowed for some distance.

Gilman v. Philadelphia upheld the validity of a statute of Pennsylvania authorizing the construction of a bridge over the Schuylkill river.

The case in 21 How. upheld two ordinances of the City of Charleston, one providing that no vessel should be in the harbor in that city for more than 24 hours; the other requiring all vessels anchored in the harbor to keep a light burning on board from dark until daylight.

R. R. C. Co. v. Fuller upholds a statute of Iowa requiring every railroad company, in September of each year, to fix its rates for the transportation of passengers and freights, and requiring a printed copy of such rates to be posted at all stations.

Smith v. Alabama upheld a statute of that state making it unlawful for a railroad engineer in that State to operate an engine without first undergoing an examination and obtaining a license from the State Board of Examiners.

Nashville v. Alabama involved the validity of a State Statute disqualifying any one from serving on railroad lines who had color blindness and defective vision.

This language is quoted from *Sherlock v. Alling:*

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a variety of ways, may affect commerce and the persons engaged in it without constituting a regulation of it within the meaning of the Constitution."

THE STATUTES OF KANSAS DO NOT REGULATE INTERSTATE COMMERCE AND DO NOT CONFLICT WITH THE ANIMAL INDUSTRY ACT OR THE REGULATIONS OF THE DEPARTMENT OF AGRICULTURE.

At page 102 of the brief for plaintiff in error, in reciting some of the provisions of the Kansas statutes, a point is made that the rule of evidence created by Section 6775 does not apply to common carriers. This is not mooted in the assignment of errors, nor has it before been mentioned in the case. But counsel are mistaken in their reading of the section. They say

"the words 'ship or transport' are not used in the section.'"

The language of the Statute, however, is (page 14 of their brief): "Proof that the cattle which such person or persons are charged with *shipping*, driving, etc." * * *

The language is plainly broad enough to cover all cases and all persons and classes of persons. Such was the manifest intention of the Legislature. To hold that the purpose was to omit carriers would be to emasculate the law—for it is common knowledge that the only way in which diseased cattle reach Kansas is by rail. Of the same grade is the argument that the word "person" in Section 6774 does not include common carriers. A corporation is a person within the meaning of the Fourteenth Amendment, although not mentioned—and no stricter rule of construction will be invoked as to this statute, especially when the object of the legislation is borne in mind—knowing, as the Legislature did, that carriers alone would "ship or transport" cattle into the State.

But all this is clearly aside from any Federal question, and belongs to the domain in which the decision of the State Court is final.

It would unreasonably extend this argument to add to what has already been said on the question of conflict, except to note the strange contention that there is such conflict, and that the State is attempting to regulate interstate commerce, because its Supreme Court observed that the plaintiff in error in bringing the cattle in question into Kansas, not only violated the State law, but transgressed also against the Federal Statute.

Of course, if the Secretary of Agriculture by his regulations exempted the Railway Company from observance of the State quarantine laws, and gave it the right to spread contagion among all the native cattle of Kansas, we are quite willing to concede the other power claimed for these regulations —that of repeal for the entire Code of Kansas Statutes covering this question.

Nor is it important (although interesting) to note the maze into which the counsel have fallen as to an imaginary conflict between these regulations and Sections 6774 and 6775 of the Statutes. It is indeed amazing, if not amusing, that an argument should be addressed to this court to the effect that because an officer of the general government is required to notify carriers of the presence of a disease in one part of the country, that, therefore,

as to all other portions thereof such carrier may ignore State health laws, and inflict such damage on helpless and innocent property holders as they please.

It would be an unprofitable task to follow the argument on this head, because it all flows from the central fallacy of a supposed purpose on the part of the State to regulate interstate commerce, and of an imaginary exclusive regulation of the shipment of diseased cattle by Congress.

The "bogie man" of States Rights cannot be thus evoked, nor the peaceful grave of the past thus despoiled. The State has not struck down the Federal Statute—in truth the State has found harmony and reasonable protection for her citizens in the scheme of co-operation proposed by Congress and her legislature. And she has no more desire now to conflict or trespass on the Federal domain than she had in passing her statute directing co-operation between her officers and those of the general government.

We are constrained to call attention to the fact that the cases cited by counsel have no application. These cattle were *diseased*. There was no such question as to the property in the original package and other cases cited (p. 111 *et seq.* op-

posing brief). There can be no doubt that this court has held and will continue to hold that the State has the power to take even a common carrier of interstate commerce by the throat at her threshold, if such carrier insists on bringing within her borders, cattle known of all men who have eyes, to be reeking with a fatal disease. It would be improper to close this part of our argument without adverting to the astonishing statement (p. 114 of brief) that State Inspectors at Fort Worth and Parsons did not deem the cattle in question to be dangerous. While this does not reflect on any Federal question, the statement should be pilloried as without foundation in the record.

With the case of *R. R. Co. v. Husen*, 95 U. S. 465, we are content to rest this case. The Missouri Statute prohibited carriers from bringing *any* cattle of a certain class into the State during two-thirds of the year. The Kansas Statute prohibited only the importation of *cattle capable of communicating disease*. The Kansas law is literally within this authority:

"While a State may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious and infectious diseases from entering the State, it

cannot, beyond what is absolutely necessary for self-protection, interfere with transportation into or through its territory."

This is quoted from the fourth paragraph of the syllabus and satisfactorily forecloses the question here at issue.

The Missouri case (*Gilmore v. Rld. Co.*, 67 Mo. 323), cited, was based on the same statute as, and follows the Husen case. And the extract from *Sherlock v. Alling* (93 U. S. pages 99, 103), will be read in connection with the facts in the case. That was an action for a marine tort growing out of a collision of two steamboats on the Ohio River, and the judgment of the State Court was affirmed.

The case of *Minnesota v. Barber*, 136 U. S. 313, is purely one of discrimination in favor of dealers in dressed meat in Minnesota, and may with that remark be safely dismissed from this debate.

THE DUTY OF THE CARRIER TO ACCEPT AND TRANSPORT THE CATTLE IN QUESTION.

The argument of the plaintiff in error under this head is only a variation of that which precedes it. Undoubtedly carriers cannot ordinarily refuse to receive for transportation any commodity which the owner is entitled to have transported. But this duty does not extend to diseased cattle any more

than to infected persons. It could with equal force be argued that plaintiff in error, while Galveston was suffering from yellow fever, was compelled to haul to or from that city victims of that plague, or that it is at all times bound to accept and transport nitro-glycerine in open packages, or petroleum in unboxed or unpacked bottles. The references of counsel to the record (as to facts) are unauthorized, as we think, but if not, the testimony abundantly shows that the cattle were grazed (to the knowledge of the plaintiff in error) on a range partly within and partly without the quarantine line of the Department of Agriculture, and that they were notoriously infected with the tick which seems to be the agency by which the disease of Texas fever is disseminated. In the nitro-glycerine cases, if the express company had been advised of the contents of the package, or if such facts existed as ought to have put it on inquiry as to such contents, the precise converse of the case actually passed on would have been present, and the opposite conclusion must have been reached by the court.

In the extracts from Hutchinson on Carriers, in the nitro-glycerine case, and in the other authorities cited by counsel, the authors are speaking of packages the contents of which could not be known

without breaking the package — here we are treating of cattle that were plainly affected with the tick that carries and communicates the disease — so plainly (as the court below found) that everyone but the Railway Company discovered them.

The mad race of the plaintiff in error to secure the business from a competing carrier had obscured this patent fact from its understanding, and the zeal of counsel has blinded their vision so that the record is mistakenly quoted in many instances — notably in the repeated statements that the Railway Company had no notice, or means of knowledge, that the cattle came from the infected district, and were notoriously laden with Texas fever ticks. Happily it is unnecessary to burden the court with more than this simple statement, for all these facts are a sealed book in this inquiry.

THE DECISION OF THE STATE COURT THAT THE RAILWAY COMPANY DID VIOLATE THE KANSAS QUARANTINE LAW IS FINAL.

Hence it would be a waste of time to combat the argument found on pp. 134 to 138 of the brief of the plaintiff in error.

THE REMOTENESS OF THE INJURY.

This is another topic which does not belong in this forum. It would, if necessary, be easy to

demonstrate from the record that the Railway Company was a party to, or at least paid the expense of driving the cattle across the country from the station where they were unloaded from the cars to the ranch of Hosier Bros., and that in making the contract of carriage this drive was provided for.

So, also, the criticism on the charge to the jury of the trial court is out of place. The instruction, however, needs no defense. The contract for the shipment of these cattle was made with the agents of the plaintiff in error, it knew where they were to come from and where they were to go; it undertook the performance of the entire service—and the instruction simply announced the familiar doctrine that the carrier was bound to exercise ordinary care in the performance of its business; that it was not bound to accept for carriage or to transport any article forbidden by the law to be transported or the transportation of which would injure others, provided it could ascertain by due diligence that such article was liable to injure or cause damage to those with whom it might come in contact during its journey.

THE CAUTIONARY RULE OF THIS COURT AS TO THE MEANING OF ITS DELIVERANCES.

The facts that called forth the language quoted by opposing counsel from decisions of this court,

under the first two heads of their brief, are so diverse and so utterly dissimilar from those disclosed in this record that no apology is needed for the invocation of the cautionary rule that, in determining the scope of its deliverances, in their application to subsequent cases, the *precise facts* of the particular case in hand are to be carefully kept in mind. Under this rule detached passages from an opinion may not be torn from their context; nor can general expressions, which, taken by themselves, may be susceptible of a given construction, be extended beyond the case actually under consideration. *Cohens v. Virginia*, 6 Wheat. 264, 399; *Hans v. Louisiana*, 134 U. S. 1, 20; *Plumley v. Massachusetts*, 155 U. S. 461, 474.

In hardly any of the authorities cited (and under which it is argued the State was powerless to protect the live-stock of her citizens from the invasion of a death-laden disease) was the factor of the police power of the State more than remotely present; nor was the court dealing with anything except obvious attempts by a State or municipality to regulate commerce—or instrumentalities of commerce—between the States or with foreign nations. The police power of the States has nowhere found a more vigorous or consistent champion than in this

court ; nor have aggressions on that power elsewhere been so ably and effectively suppressed.

Much of the meandering matter has been provoked by the voluminous opposing brief, and the pardon of the Court is prayed for all departures from the real questions at issue.

They are :

1. The Federal questions—if any there are—were not raised in time or form to entitle the plaintiff in error to have them reviewed.

2. There is no Federal question involved. (See brief of Messrs. Buck and Cunningham, pp. 10-20.)

3. The pleadings, proof and decision of the State court are broad enough to sustain the judgment without reference to the so-called Federal questions.

4. There is no conflict between the Federal and State Statutes. They form a scheme of co-operation, the execution of which depends on and is remitted to the States, except as to a single act not involved in this case.

5. The Kansas Statutes are a proper and warranted exercise by the State of its police power, and are Constitutional.

Equally with our brethern on the other side we invoke the careful consideration of the court. The

case is indeed of transcendent importance to the people of the cattle growing portion of the country, for they desire to know whether the States are powerless to repel a pestilence even when the invasion is made by a carrier of commerce between the States, and to understand whether losses (such as these judgments will partially compensate) can be ruthlessly inflicted under a supposed mantle of Federal protection.

EUGENE HAGAN,
W. C. PERRY,
MADDEN BROS.,
Attorneys for Farrington and Lantry.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF [redacted]

REPLY TO

"Memoranda of Counsel for Plaintiff in Error Touching R. R. Co., vs. Hunt, 95 U. S., 565, and Cornish vs. Ball, 120 U. S., 217."

J. JAY BUCK,
E. W. CUNNINGHAM,
Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 268.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Plaintiff in Error*,

vs.

CHARLES HABER ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY TO

"Memoranda of Counsel for Plaintiff in Error Touching R. R. Co., vs. Husen, 95 U. S., 465, and Kimmish vs. Ball, 129 U. S., 217."

Through the courtesy of the Clerk we are just in receipt of "Memoranda" by plaintiff in error, drawn and filed since the closing of the oral argument January 27.

We recall vividly the earnestness and zeal displayed by the other side in their lame attempt to show that as a fact the plaintiff in error, as a common carrier, did not know nor suspicion that the cattle so shipped were dangerous to our native cattle, and further, by some occult

reasoning, that the jury had so found. Of course that contention and that effort find no warrant in the record of this case, and is conclusively disproved thereby. Counsel do, however, now retract all they said in that respect and certainly apologize for their criticism of the little presumptive evidence thrown into the Kansas Statute, (but upon which presumptive evidence we did not rely upon the trial), and demonstrate now that the Kansas statute was correct and was upon a proper basis, and that the legislature of Kansas, in adopting that statute, merely announced what all the world knows—where it knows anything about the matter—that those cattle presumptively would communicate the Texas fever. The confession we insist our opponents have made is found on page three of said "Memoranda," and in these words:

"Time has demonstrated as true what was contended by counsel for the constitutionality of the Missouri statute, and what was decided by the supreme courts of Missouri and Illinois prior to the decision by this court of the Husen case, that *all* Texas cattle coming from within certain districts during certain periods of the year are liable to communicate Texas fever to domestic cattle."

"Time" had demonstrated all these facts before the Kansas statute of 1891 was passed, and therefore all criticism henceforth on that statute should cease.

Immediately following the above quotation on page three of said "Memoranda," we find this expression:

"What has been *done* by this court is more important than what may have been casually *said* in some particular opinion."

We concede that until the judgment in the Husen case was concluded by a realization on final execution, or compliance without the aid of such writ, what was "done" in the Husen case was important and controlling in that case, but in that case only. In other words, the record of the Husen case should control the Husen case and no

other, while the construction placed upon, or interpretation given to that record, as manifested in the opinion of that case and subsequent cases, is what should be regarded as controlling law. The attempt by plaintiff in error to show that this court misunderstood the record in the Husen case, we believe unwarranted, but are indifferent whether they be correct or no; because, as before suggested, the opinion in the Husen case, and this court in Kimmish vs. Ball, 129 U. S., 217 *et seq.*, announces how it "interpreted" the Missouri law (see brief of Hagan and Perry, page 37). That interpretation was that the Missouri law denied the inter-state shipment of *all* Texas cattle and for that reason alone was invalid. Our Kansas law certainly is no stronger than the Iowa law passed upon in Kimmish vs. Ball, and there sustained.

Until reading the aforesaid "Memoranda" we had supposed that it was competent and within the police power of our state to prohibit bringing into Kansas 1,500 head of dangerous animals, unloading them on to our prairies, to be driven twenty-five miles over our highways, pastured often by our domestic cattle. We now find on page two of said "Memoranda" a proposition which we believe was never argued in any supreme court before, never insisted upon before, and is not only not warranted by any decision of this court but stands impeached by every decision this court has ever rendered where the subject was fairly presented and elaborately discussed, viz: "Therefore our contention is that the Husen case broadly denies the power of the state to forbid the transportation of cattle capable of communicating disease from one state into or through another state, and to now sustain the constitutionality of the Kansas statute will be to practically overrule the Husen case."

We regard this as robust sophistry, and modestly suggest that if the Husen case meant and means what it is interpreted to mean by this "Memoranda," the sooner

it is overruled the better; because if it is so to be interpreted it becomes a *rara avis* in judicial decisions. Again, if the contention and interpretation of plaintiff in error is now to be announced as the rule of this Court, it, by one fell swoop, annihilates and overrules a score or more of carefully written opinions of this Court announcing the doctrine that police power and the management of internal affairs was by our form of government left with the several states for disposition.

If time has demonstrated that all Texas cattle coming from within certain districts during certain periods of the year are liable to communicate Texas fever to domestic cattle, then time has vindicated the right of the several states, under the police power inherent in them, to utterly prohibit the importation.

"It will be a sad day" for the rights of the individual states of this Union and their authority to enact laws under their reserved police powers, if this Court, by adopting the views of counsel expressed in said "Memoranda," shall effectually deny said rights to the sovereign states.

J. JAY BUCK,
E. W. CUNNINGHAM,
Counsel for Defendants in Error.

Syllabus.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* HABER.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 268. Argued January 27, 1898. — Decided March 14, 1898.

The act of Kansas of 1891, c. 201, as amended and as it appears in 2 Gen. Stats. Kansas, 1897, 761, c. 139, relating to bringing into the State cattle liable or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of the State, and providing for the trial of civil actions brought to recover damages therefor, is not overridden by the act of Congress of March 29, 1884, 23 Stat. 31, c. 60, known as the Animal Industry Act, nor by the act of March 3, 1891, 26 Stat. 1044, 1049, c. 544, appropriating money to carry out the provisions of the above act, nor by section 5258 of the Revised Statutes, authorizing every railroad company in the United States, operated by steam, its successors and assigns, "to carry upon and over its road, boats, bridges and ferries all passengers, troops, Government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination"; as Congress has not assumed to give to any corporation, company or person the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases.

Whether a corporation transporting, or the person causing to be transported from one State to another, cattle of the class specified in the Kansas statute should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle, is a subject about which the act of March 29, 1884, c. 60, 23 Stat. 31, known as the Animal Industry Act, did not make any provision.

The provision in the Kansas act imposing such civil liability is in aid of the objects which Congress had in view when it passed the Animal Industry Act, and it was passed in execution of a power with which the State did not part when entering the Union, namely, the power to protect the people in the enjoyment of their rights of property, and to provide for the redress of wrongs within its limits, and is not, within the meaning of the Constitution, nor in any just sense, a regulation of commerce among the States.

A state statute, although enacted in pursuance of a power not surrendered to the General Government, must in the execution of its provisions yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress; and this, without regard to the source of power whence the state legislature derived its enactment.

Counsel for Parties.

Neither corporations nor individuals are entitled by force alone of the Constitution of the United States and without liability for injuries resulting therefrom to others, to bring into one State from another State cattle liable to impart or capable of communicating disease to domestic cattle.

Although the powers of a State must in their exercise give way to a power exerted by Congress under the Constitution, it has never been adjudged that that instrument by its own force gives any one the right to introduce into a State, against its will, cattle so affected with disease that their presence in the State will be dangerous to domestic cattle.

Prior cases reviewed and held to proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a State belongs primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes.

An act of Congress that does no more than give authority to railroad companies to carry "freight and property" over their respective roads from one State to another State, will not authorize a railroad company to carry into a State cattle known, or which by due diligence may be known, to be in such a condition as to impart or communicate disease to the domestic cattle of such State.

If the carrier takes diseased cattle into a State, it does so subject for any injury thereby done to domestic cattle to such liability as may arise under any law of the State, that does not go beyond the necessities of the case and burden or prohibit interstate commerce, and a statute prescribing as a rule of civil conduct that a person or corporation shall not bring into the State cattle known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, cannot be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes.

If Congress could authorize the carrying of such cattle from one State into another State, and by legislation protect the carrier against all suits for damages arising therefrom, it has not done so, nor has it enacted any statute that prevents a State from prescribing such a rule of civil conduct as that found in the statute of Kansas.

THE case is stated in the opinion.

Mr. James Hagerman, *Mr. T. N. Sedgwick* and *Mr. Simon Sterne* for plaintiff in error.

Mr. E. W. Cunningham, *Mr. J. Jay Buck* and *Mr. W. C.*

Perry for defendants in error. *Mr. Eugene Hagan* was with them on their briefs.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought in one of the courts of Kansas against the Missouri, Kansas and Texas Railway Company, a corporation of that State, and certain persons constituting the respective firms of F. Brogan & Sons and Hozier Bros. Its object was to recover the damages sustained by the plaintiff Charles Haber, one of the appellees, by reason of the defendants having brought and caused to be brought into that State certain cattle alleged to have been affected with the disease known as Texas, splenic or Spanish fever, and communicated by them to the plaintiff's cattle whereby the latter sickened and died.

Many persons having like causes of action intervened as parties defendant, and each by cross-petition asked judgment against the railway company.

It appeared in evidence that Hozier Bros. in the spring of 1892 owned and controlled a ranch of several thousand acres of land in Pecos County, Texas, upon which cattle known as Texas cattle were permitted to range. They entered into an agreement with F. Brogan & Sons, whereby the latter were to receive from the former a part of the above cattle at some point in Lyon County, Kansas, and take them to their ranch in Chase County in the same State to be there grazed during the summer of 1892. In execution of that agreement, Hozier Bros. caused to be shipped by railroad into Kansas from Pecos County, Texas, about 2500 head of cattle which were delivered by the defendant company in its stock yards at Hartford, Kansas, to F. Brogan & Sons, and by the latter were driven through Lyon and Chase counties to their range. These cattle, it was alleged, communicated Texas, splenic or Spanish fever to domestic cattle that were owned by the plaintiff and by the cross-petitioners.

The case was tried and submitted to the jury only as between the plaintiff, the cross-petitioners and the railway com-

pany, the latter denying liability for any damages sustained by the former. The trial resulted in verdicts and judgments in favor of the plaintiff and of each of the cross-petitioners. The judgments having been affirmed by one final judgment in the Supreme Court of Kansas, the case is here upon a writ of error sued out by the railway company, which contends that effect has been given to statutes of the State that are repugnant to the Constitution and laws of the United States. That contention involves the Federal question presented for determination.

In 1881 the legislature of Kansas passed an act for the protection of cattle in that State against contagious diseases. Laws of Kansas, 1881, c. 161. But those provisions need not be set out here, because they appear in subsequent enactments to which we will presently refer.

By a state enactment approved March 25, 1884, provision was made for a Live Stock Sanitary Commission, which was charged with the duty of protecting "the health of the domestic animals of the State from all contagious or infectious diseases of a malignant character," and was empowered to establish, maintain and enforce such quarantine, sanitary and other regulations as it deemed necessary. Laws of 1884, c. 2, § 2. And by an act approved March 26, 1884, that commission was authorized to create and enforce quarantine against the disease known as Texas, splenic or Spanish fever in the unorganized counties of the State. Laws of 1884, c. 4, § 1. The commission was also authorized and directed by another act approved on the same day to coöperate with the Commissioner of Agriculture of the United States or any officer of the General Government in the suppression and extirpation of contagious diseases among domestic animals, and in the enforcement and execution of all acts of Congress passed to prevent the importation or exportation of diseased cattle and the spread of infectious or contagious disease among domestic animals. Laws of 1884, c. 5, § 1.

In 1885 another statute was passed, which was amended in 1891. Laws of 1891, c. 201. As amended, and as it appears in General Statutes of Kansas of 1897, vol. 2, c. 139, p. 761,

that statute made it a misdemeanor for any person, between the first day of February and the first day of December of any year, to drive or cause to be driven into or through any county in the State, or to turn upon or cause to be turned or kept upon any highway, range, common or pasture within the State, any cattle capable of communicating or liable to impart what is known as Texas, splenic or Spanish fever. § 13. By another section it was made the duty of any sheriff, under sheriff, deputy sheriff or constable within the State, upon complaint made to him that there were within the county where such officer resided cattle believed to be capable of communicating or liable to impart the disease known as Texas, splenic or Spanish fever, to forthwith take charge of and restrain them under such temporary quarantine regulations as would prevent the communication of such disease, and make immediate report thereof to the Live Stock Sanitary Commission. § 14.

Other sections provided —

"§ 16. Any person or persons who shall drive, ship or transport, or cause to be shipped, driven or transported, into or through any county in this State, any cattle liable or capable of communicating Texas, splenic or Spanish fever, to any domestic cattle of this State, shall be liable to any person or persons injured thereby for all damages that they may sustain by reason of the communication of said disease, or Texas, splenic or Spanish fever, to be recovered in a civil action in any court of competent jurisdiction, and the parties so injured shall have a first and prior lien to all other liens for such damages on the cattle communicating the disease of Texas, splenic or Spanish fever.

"§ 17. In the trial of any person charged with the violation of any provisions of this act, and in the trial of any civil action brought to recover damages for the communication of Texas, splenic or Spanish fever, proof that the cattle which such person or persons are charged with shipping, driving or keeping, or which are claimed to have communicated the said diseases, were brought into this State from south of the thirty-seventh parallel of north latitude, shall be taken as

prima facie evidence that such cattle were, between the first day of February and the first day of December of the year in which the offence was committed, capable of communicating and liable to impart Texas, splenic or Spanish fever, within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full knowledge and notice thereof. If the owner or owners or person or persons in charge of said cattle shall show by such certificate or certificates, as shall hereafter be designated by the Live Stock Sanitary Commission of the State, that the said cattle had been kept since the first day of December of the previous year west of the twenty-second meridian of longitude west from Washington, and north of the thirty-fourth parallel of north latitude, the provisions of this section shall not apply thereto.

"§ 18. Whenever two or more persons shall in violation of this act, at the same time or at different times during the same year, drive or cause to be driven upon the same highway, range, common or pasture within this State, any cattle capable of communicating or liable to impart Texas, splenic or Spanish fever, they shall be jointly and severally liable for all damages that may arise from the communication of such disease at any time thereafter during the same year to any native, domestic or acclimated cattle that shall have been upon the same highway, range, common or pasture so previously travelled over by such first-mentioned cattle."

The general contention of the plaintiff in error is that the act of Congress of May 29, 1884, 23 Stat. 31, c. 60, known as the Animal Industry Act, together with the act of March 3, 1891, 26 Stat. 1044, 1049, c. 544, appropriating money to carry out the provisions of that act, and section 5258 of the Revised Statutes relating to the transportation of passengers, freight, property, etc., from one State to another State by railroad, cover substantially the whole subject of the transportation from one State to another State of live stock liable to impart or capable of communicating infectious or contagious diseases, and therefore that the State of Kansas has no authority to deal in any form with that subject.

Are the acts of Congress and the regulations established under their authority of such a character that the legislation of Kansas is without effect so far as it relates to injury done to domestic cattle by the bringing into that State of cattle liable to impart or capable of communicating Texas, splenic or Spanish fever to domestic cattle?

The act of Congress of May 29, 1884, provided for the establishment of a Bureau of Animal Industry, and for the appointment of a chief thereof and two competent, practical stock raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it should be under the instructions of the Commissioner of Agriculture, to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also to examine and report upon the best methods of treating, transporting and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous, contagious, infectious and communicable diseases. §§ 1, 2.

By other sections of the act it was provided:

"§ 3. That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to coöperate in the execution and enforcement of this act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the Governor of a State or other properly constituted authorities signify their readiness to coöperate for the extinction of any contagious, infectious or communicable disease in conformity with the provisions of

this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another.

"§ 4. That in order to promote the exportation of live stock from the United States the Commissioner of Agriculture shall make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require.

"§ 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious or communicable disease, and especially pleuro-pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary.

"§ 6. That no railroad company within the United States, or the owners or masters of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious or communicable disease; nor shall any person, company or corporation drive on foot or transport in private conveyance from

one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia: *Provided*, That the so-called splenetic or Texas fever shall not be considered a contagious, infectious or communicable disease within the meaning of sections four, five, six and seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

"§ 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat or other transportation company doing business in or through any infected locality, and by publication, in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section six of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

"§ 10. That the sum of one hundred and fifty thousand dollars, to be immediately available, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to carry into effect the provisions of this act."

1. The answer of the railway company as well as its requests for instructions, and the opinion of the Supreme Court of the State, show that the company contended throughout this litigation that legislation by Congress and the regulations prescribed by the Secretary of Agriculture in execution of the Animal Industry Act, furnished a complete defence to all claims for damages asserted in this action. That contention

was overruled by the trial court, as well as by the Supreme Court of the State. If the contention of the railway company had been sustained, the verdict and judgment must have been in its favor without reference to any other question in the case. In other words, the state court could not properly have disposed of the case without deciding the Federal question raised by the company. This court therefore has jurisdiction to inquire whether the Supreme Court of Kansas erred in holding that the legislation of Congress and the regulations of the Secretary of the Interior[1] gave to the railway company the right, privilege and immunity specially set up and claimed by it. The motion to dismiss for want of jurisdiction in this court is consequently overruled. *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, 251; *Chicago Life Ins. Co* v. *Needles*, 113 U. S. 574, 579; *Sayward* v. *Denny*, 158 U. S. 180, 184; *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, 232.

2. If sections 16 and 17 of the Kansas act of 1885, as amended in 1891, are not inconsistent with the legislation of Congress, no question can be raised as to other provisions of the Kansas statutes. The sixteenth section, we have seen, provides that any person or persons, driving, shipping or transporting, or causing to be driven, shipped or transported, into or through any county in that State, cattle liable to impart or capable of communicating Texas, splenic or Spanish fever to any domestic cattle of Kansas, shall be liable in a civil action to any person injured thereby for all damages sustained by reason of the communication of such fever to his cattle; while the seventeenth section makes the bringing into the State, from south of the 37th parallel of north latitude, of cattle alleged to have communicated Texas, splenic or Spanish fever

[1] By the act approved February 9, 1889, 25 Stat. 659, c. 122, the Department of Agriculture was made an Executive Department. And by the act of March 2, 1889, 25 Stat. 835, 840, c. 373, the authority granted to the Commissioner of Agriculture by the act of May 29, 1884, 23 Stat. 31, establishing the Bureau of Animal Industry, and by the provision of the appropriation act for the Agricultural Department, approved July 18, 1888, relating to that Bureau, was vested in the Secretary of Agriculture. The regulations above referred to were issued by Secretary Rusk, February 26, 1892.

to domestic cattle, *prima facie* evidence that such cattle were, between February 1st and December 1st in any year, capable of communicating that disease, and that the owner or person in charge of such cattle had full knowledge and notice thereof.

May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. *Sinnot* v. *Davenport*, 22 How. 227, 243.

We have seen that the first section of the Animal Industry Act provided for an investigation as to the condition of the domestic animals of the United States, their protection and use, the causes of contagious, infectious and communicable diseases among them, and the means for the prevention and cure of such diseases. The second section provided for an examination as to the best methods of treating, transporting and caring for animals and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to guard against the spreading of other dangerous, contagious, infectious and communicable diseases. If any State was ready to coöperate with the Commissioner of Agriculture, then, by the third section, that officer was authorized to use the money appropriated by Congress in such investigations and in such disinfection and quarantine measures as were necessary "to prevent the spread of the disease from one State or Territory into another." While the States were invited to coöperate with the General Government in the execution and enforcement of the act, whatever power they had to protect their domestic cattle against such diseases was left untouched and unimpaired by the act of Congress.

The act of Congress did not assume to give any corporation, company or person the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communi-

cable diseases. On the contrary, it was made a misdemeanor to deliver for transportation or to transport or drive from one State to another, cattle known to be affected with contagious, infectious or communicable diseases. Whether a corporation transporting, or the person causing to be transported from one State to another cattle of the class specified in the Kansas statute, should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle, is a subject about which the Animal Industry Act did not make any provision. That act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some state enactment for damages arising out of the introduction into that State of cattle so affected. And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to any one against such liability.

By those regulations the Secretary gave notice to the "managers and agents of railroad and transportation companies of the United States, stockmen and others" that "a contagious and infectious disease known as splenetic or Southern fever exists among cattle" within certain parts of the United States, the outer line of which area or boundary was fully defined by that officer. The same regulations provided that from the 1st day of March to the 1st day of December, 1892, no cattle should be transported from any part of the country included in that area or boundary to any part of the United States north or west of the described line except by rail for immediate slaughter, and when so transported certain directions were to be observed in handling and caring for them. The regulations made provision for moving cattle from specified parts of Tennessee in accordance with the rules established by the authority of that State. Rules were also prescribed for moving cattle from named counties in Texas to the States of Colorado, Wyoming and Montana, "in ac-

cordance with the regulations made by said States for the admission of Southern cattle thereto."

The cattle in question were originally received by the Texas and Pacific Railroad at Midland, Texas, outside of but near to the boundary of the "infected district" as defined by the Secretary of Agriculture. They were received by the defendant company at Dennison, Texas, as a connecting carrier, in the same cars in which they were loaded, and the entire route to the southern boundary line of Kansas was through that district. It may be that in the transportation of the cattle in question from Pecos County, Texas, through the infected district, all the regulations prescribed by the Secretary were observed. But that fact does not show that Congress intended or assumed to exempt any one complying with those regulations from liability to the owners of domestic cattle to which were communicated the contagious disease with which the cattle brought into the State were affected. The controlling object of the regulations was to prevent the spreading from one State to another of the cattle disease in question, not to deprive any one of the right to recover damages for injury inflicted upon his domestic cattle by reason of their being brought into contact with diseased cattle.

It is said that the statute of Kansas giving a right of action for damages is, in itself, a regulation of commerce among the States, and, therefore, inconsistent with the power of Congress to regulate such commerce. But that statute is not, within the meaning of the Constitution, nor in any just sense, a regulation of commerce among the States. It cannot be supposed to have been so intended, even if its validity were to depend upon the intent with which it was enacted. It did nothing more than declare as a rule of civil liability in Kansas, that any one driving, shipping or transporting or causing to be driven, shipped or transported into or through any county in that State, cattle liable to impart or capable of communicating Texas, splenic or Spanish fever to domestic cattle, should be responsible in damages to any persons injured thereby. In fact, the state law is in aid of the objects which Congress had in view when it passed the Animal Industry Act. It was

passed in execution of a power with which the State did not part when entering the Union, namely, the power to protect the people in the enjoyment of their rights of property, and to provide for the redress of wrongs within its limits. We must not be understood as saying that this power may be so exerted as to defeat or burden the exercise of any power granted to Congress. On the contrary, a state statute, although enacted in pursuance of a power not surrendered to the General Government, must in the execution of its provisions yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress; and this, as was said by Mr. Justice Nelson, speaking for the court in *Sinnot* v. *Davenport*, above cited, "without regard to the source of power whence the state legislature derived its enactment." This results, as was said by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 210, as well from the nature of the Government as from the words of the Constitution. In that case, the argument was pressed that if a law passed by a State in the exercise of its acknowledged sovereignty comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like "equal opposing powers." Touching that view, the Chief Justice said: "But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

Nor is the statute of Kansas to be deemed a regulation of

commerce among the States, simply because it may incidentally or indirectly affect such commerce. *Hennington* v. *Georgia*, 163 U. S. 299, 317; *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628, 631; *Chicago, Milwaukee & St. Paul Railway* v. *Solan*, 169 U. S. 133; *Richmond & Alleghany Railroad* v. *Patterson Tobacco Co.*, 169 U. S. 311, and authorities cited in each case. Although the power of Congress to regulate commerce among the States, and the power of the States to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the National and state governments or produce any conflict between the two governments in the exercise of their respective powers need occur, unless the National Government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the state legislation may refer. "The same bale of goods," Mr. Justice Johnson well said in his concurring opinion in *Gibbons* v. *Ogden*, "the same cask of provisions, or the same ship, that may be the subject of commercial regulations, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision." 9 Wheat. 235. It is, therefore, a mistake to say that the Kansas statute so far as it gives a right of action for injuries arising from disease communicated to domestic cattle by cattle of a particular kind brought into the State comes into conflict with any regulation established under the authority of Congress, to prevent the spread of contagious or infectious diseases from one State to another. That statute, we repeat, only embodies a rule of civil conduct prescribed by a State whose government is competent to regulate — in subordination always to the supreme law of the land and its

own fundamental law — the relative rights and obligations of all within its jurisdiction. Neither corporations nor individuals are entitled, by force alone of the Constitution of the United States and without liability for injuries resulting therefrom to others, to bring into one State from another State cattle liable to impart or capable of communicating disease to domestic cattle. The contrary cannot be affirmed under any sound interpretation of the Constitution. This court while sustaining the power of Congress to regulate commerce among the States has steadily adhered to the principle that the States possess, because they have never surrendered, the power to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the National Constitution, nor come in conflict with acts of Congress passed in pursuance of that instrument. Although the powers of a State must in their exercise give way to a power exerted by Congress under the Constitution, it has never been adjudged that that instrument by its own force gives any one the right to introduce into a State, against its will, cattle so affected with disease that their presence in the State will be dangerous to domestic cattle.

This principle is illustrated in many adjudged cases. In *Railroad Co.* v. *Husen*, 95 U. S. 465, 471, 473, — a case much relied on by the plaintiff in error, — this court held to be unconstitutional a statute of Missouri declaring that no Texas, Mexican or Indian cattle, not kept the entire previous winter in that State, should be driven or otherwise conveyed into or remain in any county in that State between the first day of March and the first day of November in each year. The statute contained a proviso to the effect "that when such cattle shall come across the line of this State, loaded upon a railroad car or steamboat, and shall pass through this State without being unloaded, such shall not be construed as prohibited by this act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line

of such transportation; and the existence of such disease along such route shall be *prima facie* evidence that such disease has been communicated by such transportation." It also provided: "If any person or persons shall bring into this State any Texas, Mexican or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." In that case, the court cited with approval the language of the Supreme Court of Vermont in *Thorpe* v. *Rutland & Burlington Railroad*, 27 Vermont, 140, in which it was said that, by the general police power of a State, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned." Under that power, this court said, that while a State by legislation may not invade the domain of the National Government, it may *exclude* from its limits convicts, paupers, idiots and lunatics, persons likely to become a public charge, as well as persons affected by contagious or infectious diseases — adding, that the same principle "would justify the exclusion of property dangerous to the property of citizens of the State, for example, *animals having contagious or infectious diseases.*" Such exertions of power by a State, it was said, were self-defensive. In affirming the invalidity of state legislation professing to be an exercise of police powers for protection against evils from abroad, but which was beyond the necessity for its exercise, and interfered with the rights and powers of the Federal Government, the court, speaking by Mr. Justice Strong, said, p. 473: "Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle, or Indian cattle between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether

they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."

The decision in that case was placed distinctly on the ground that although the State could prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State, it could not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce, and the Missouri statute was held to be unconstitutional because it went beyond the necessities of the case, having been so drawn as to exclude all Texas, Mexican or Indian cattle from the State, (except cattle to be transported across and out of the State,) whether free from disease or not, or whether they would or would not do injury to the inhabitants of the State.

No such criticism can be made of the statute of Kansas. It does not prohibit the bringing into the State of *all* Texas cattle. It does not in any true sense prohibit or burden any commerce among the States specifically authorized by Congress; but, for purposes of self-protection only and in the exercise of its inherent power to protect the property of its people, declared that any corporation or person bringing into the State or driving into or through any county of the State cattle liable to impart or capable of communicating Texas, splenic or Spanish fever to domestic cattle, should be responsible in damages to any one to whose cattle that disease was communicated by the cattle so brought into the State.

The general views we have expressed are sustained by *Kimmish* v. *Ball*, 129 U. S. 217, 220, 222. That case involved the validity of section 4059 of the Iowa Code providing, in respect of Texas cattle that had not been wintered at least one winter north of the southern boundary of Missouri or Kansas, that "if any person now or hereafter has in his pos-

session, in this State, any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large, and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished as is prescribed in the preceding section." It was contended that that section was in conflict with the power of Congress to regulate commerce among the States, as well as with section 2 of Article 4 of the Constitution of the United States relating to the privileges and immunities of citizens of the several States. The court stated that the statute of Iowa was based upon the notorious fact that cattle which were brought during the spring and summer months from Texas and Arkansas and from the Indian Territory, were often affected with what is known as Texas fever, and that all danger of infection therefrom could be removed by cold weather, such as was usual in the country north of the southern boundary of Missouri and Kansas. Speaking by Mr. Justice Field, it said: "Section 4059, with which we are concerned, provides that any person who has in his possession in the State of Iowa any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spread the disease. We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate interstate commerce. We do not see that it has anything to do with that commerce; it is only levelled against allowing diseased Texas cattle held within the State to run at large." In reference to the other objection made to the act, the court said: "There is no denial of any rights and privileges to citizens of other States which are accorded to citizens of Iowa. No one can allow diseased cattle to run at large in Iowa without being held responsible for the damages caused by the spread of the disease thereby; and the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States does not give non-resident citizens of Iowa any greater privileges and immunities in that State than her own citizens there enjoy. So far as liability is concerned for the act mentioned,

citizens of other States and citizens of Iowa stand upon the same footing."

The case of *Sherlock* v. *Alling*, 93 U. S. 99, 103, well illustrates the principle which, we think, must control the present case. That was an action for damages under a statute of Indiana, giving a right of action in favor of the personal representative of one whose death was caused by the wrongful act or omission of another, whenever the latter, if he had lived, could sue for an injury for the same act or omission. In that case the death, on account of which the suit was brought, occurred by reason of a collision between two steamboats navigating the Ohio River. It appears from the report of the case that one of the grounds of defence was that at the time of the alleged injuries the colliding boats were engaged in carrying on interstate commerce under the laws of the United States, and that the defendants, as their owners, were not liable for injuries occurring in navigation through the carelessness of their officers, except as prescribed by Congress; and that the acts of Congress did not cover the liability asserted by the plaintiff under the statute of Indiana. The act of Congress referred to was that of March 30, 1852, 10 Stat. 61, c. 106, providing for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam. After referring to some of the principal cases in which state enactments had been held void for interfering with the freedom of interstate commerce, the court said that the Indiana statute "imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety

be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce it was never intended to cut the State off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." Again, in the same case: "Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress."

In *Patterson* v. *Kentucky*, 97 U. S. 501, 505, this court said that "the States may by police regulations protect their people against the introduction within their respective limits of infected merchandise," and by like regulations "exclude from their midst, not only convicts, paupers, idiots, lunatics and persons likely to become a public charge, but animals having contagious diseases."

So it has been held that in the absence of legislation by Congress on the subject, a State may prescribe, as a rule of civil conduct, that engineers on railroad trains engaged in the transportation of passengers and freight, including interstate trains, shall undergo an examination by a state board as to their qualifications, before becoming entitled to operate locomotive engines within such State, and that persons employed on railways shall be subjected to like examination with respect to their power of vision. *Smith* v. *Alabama*, 124 U. S. 465, 482; *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96, 101.

In *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628, 633, it was contended that section 5258

of the Revised Statutes, relating to transportation of persons and property from one State to another State, so far covered the whole subject of interstate transportation as to render inapplicable to interstate carriers a statute of New York regulating the heating of steam passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles. But this court said that the authority conferred by Congress "upon railroad companies engaged in commerce among the States, whatever may be the extent of such authority, does not interfere in any degree with the passage by the state of laws having for their object the personal security of passengers while travelling, within their respective limits, from one State to another on cars propelled by steam."

In *Western Union Tel. Co.* v. *James*, 162 U. S. 650, 660, this court sustained as valid a statute of Georgia requiring every telegraph company, with a line of wires wholly or partly within that State, to receive dispatches, and, on payment of the usual charges, to transmit or deliver them with due diligence, under a penalty of one hundred dollars. It was contended in that case, as to telegraph messages from points outside to points inside the State, that the local statute was a regulation of interstate commerce, and, therefore, void. That contention was overruled, the court saying: "It would not unfavorably affect or embarrass it in the course of its employment, and hence until Congress speaks upon the subject, it would seem that such a statute must be valid. It is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed, with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor. The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith

and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a State belong primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes.

It is suggested that the statute is so drawn that the railway company would be liable, even if it acted in good faith, and had no reason to believe, after the exercise of the utmost diligence, that the cattle it received for transportation were liable to impart or were capable of communicating the fever named in the statute. If the statute were thus interpreted, it might be — though upon that point we express no opinion — that it would be so oppressive in its necessary operation as to be deemed a burden upon the transportation of all cattle from Texas, whether diseased or not, and for that reason be liable to the same objection urged against the statute involved in *Railroad Co.* v. *Husen*. But we do not so construe the statute. Its sixteenth section must be interpreted in connection with the seventeenth section. The latter, as we have stated, declares that in the trial of any civil action, under the statute, proof that the cattle were brought into the State from south of the thirty-seventh parallel of north latitude — the southern boundary line of Kansas — should be *prima facie* evidence that they were, between the first day of February

and the first day of December, capable of communicating and liable to impart Texas, splenic or Spanish fever, and that "the owner or owners, or person or persons, in charge of such cattle had full knowledge or notice thereof." As the State is competent to protect its domestic cattle against disease that may be communicated by cattle coming from beyond its limits, this rule of evidence cannot be regarded as inconsistent with any right secured by the National Constitution or as obstructing commerce among the States; for the rule finds its justification in the fact, heretofore recognized by this court, and substantially by the act of Congress, that Texas cattle, when brought northward during the spring and summer months, often carry the germs of fever, or are often, though not always, infected with fever that may be communicated by them to domestic cattle. That rule as prescribed implies that damages shall not be recovered if, from all the evidence, it appears that the defendant had no knowledge or notice that the cattle were of the kind forbidden by the statute to be brought into the State. This was the interpretation placed upon the statute by the plaintiff. His petition alleges that before the cattle in question were shipped, transported and driven as stated, the defendants had knowledge, and were put upon inquiry, and had reason to know, that "said Texas cattle so kept, shipped, transported and driven were of a kind capable of communicating and liable to communicate and impart said disease to the domestic cattle of this State and to the aforesaid cattle of the plaintiff." And under this construction of the statute the case was tried. The trial court, among other things, instructed the jury: "The mere fact that the cattle of the plaintiff or those of any of the cross-petitioning defendants became sick and died from this disease imparted to them by cattle transported by the said defendant into Lyon or Chase counties is not sufficient to warrant a finding against said defendant railway company. You must find from the evidence, first, that Texas cattle were, in fact, brought into this State; of this there is no denial, and you can consider that fact as established; second, that the cattle of the plaintiff and each of the cross-petitioning defendants who seek to recover herein against

said railway, because of the loss of cattle, became infected and died because of the disease imparted to them by such Texas cattle, and that such disease was Texas, splenic or Spanish fever; and, third, that the officers, employés or agents of the railway company defendant had knowledge that such Texas cattle transported by it to this State were liable to impart such disease to the native cattle of this State, or that they ought by the exercise of diligence and care to have known of the dangerous character of these cattle, and that they would or were liable to impart said disease to the native cattle of this State." We do not understand from the opinion of the Supreme Court of the State that it disagreed with this interpretation of the statute.

3. In support of the contention that national legislation leaves no room for state enactments relating to the bringing of diseased cattle into one State from another State, the railway company refers to the act of Congress, approved March 3, 1891, 26 Stat. 1044, 1049, c. 544, appropriating five hundred thousand dollars for carrying out the provisions of the act for establishing the Bureau of Animal Industry, which authorized the Secretary of Agriculture to use any part of that sum he might deem necessary or expedient, and in such manner as he might think best, to prevent the spread of pleuro-pneumonia and other diseases of animals, and for this purpose to employ as many persons as he might deem necessary, and to expend any part of that sum in the purchase and destruction of diseased or exposed animals and the quarantine of the same, whenever in his judgment it is essential to prevent the spread of pleuro-pneumonia or other diseases of animals from one State into another. This contention is disposed of by what has been already said.

4. In support of the same contention, the company refers to section 5258 of the Revised Statutes of the United States, (brought forward from the act of June 15, 1866, 14 Stat. 66, c. 124,) which authorizes every railroad company in the United States, operated by steam, its successors and assigns, "to carry upon and over its road, boats, bridges and ferries all passengers, troops, Government supplies, mails, freight

and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." It is scarcely necessary to say that an act of Congress that does no more than give authority to railroad companies to carry "freight and property" over their respective roads from one State to another State, will not authorize a railroad company to carry into a State cattle known, or which by due diligence may be known, to be in such a condition as to impart or communicate disease to the domestic cattle of such State. A railroad company carrying diseased cattle into a State cannot claim the protection of section 5258, any more than it could when carrying into a State rags known, or which by proper diligence could have been known, to be infected with yellow fever. If the carrier takes diseased cattle into a State, it does so subject for any injury thereby done to domestic cattle to such liability as may arise under any law of the State that does not go beyond the necessities of the case and burden or prohibit interstate commerce. A statute prescribing as a rule of civil conduct that a person or corporation shall not bring into the State cattle known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, cannot be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes.

Applying the principles settled in prior cases to the case before us, it is clear that a railroad company is not in any just sense hindered or obstructed by the statute of Kansas in the exercise of any privilege given or authority conferred by section 5258 of the Revised Statutes. This must be so, unless the company should be held to be entitled, of right, to carry into a State from another State, as freight or property, cattle liable to impart or capable of communicating disease, and of whose condition at the time it had knowledge, or could have had knowledge by the exercise of reasonable diligence. We cannot so hold. And we adjudge that if Congress could authorize the carrying of such cattle from one State into another

State, and by legislation protect the carrier against all suits for damages arising therefrom, it has not done so, nor has it enacted any statute that prevents a State from prescribing such a rule of civil conduct as that found in the statute of Kansas.

5. Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, was in violation of the Federal Constitution. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, 242, 246.

Perceiving no error in the record in respect of any question of a Federal nature, the judgment of the Supreme Court of Kansas is

Affirmed.

Mr. Justice Brewer dissenting.

I am unable to concur in the opinion filed in this case. The statute provides that a carrier bringing into the State cattle which are capable of communicating Texas, splenic or Spanish fever to domestic cattle shall be liable to any persons injured thereby for all damages they may sustain by reason of the communication of said fever. This liability is not limited to the injury which may be done by the cattle while in the possession of the carrier, but extends to that which may be done at any time thereafter in whosesoever possession they may be. And in this particular case it is found by the jury that the fever was communicated and the injury done after the cattle had passed out of the custody of the carrier and into the possession of other persons. The statute also provides that proof that the cattle were brought into Kansas from territory south of the Kansas state line shall be *prima facie* evidence that they were capable of communicating the fever, and that the carrier had knowledge of that fact.

I am not disposed to belittle this question, or the difficulties which attend the effort to prevent a communication of Texas fever and the injuries which result therefrom. On the con-

trary, I fully appreciate the importance of securing to all stock owners in Kansas and elsewhere the fullest protection against this so fatal disease, and believe that stringent measures may properly be adopted to accomplish this result. I differ with my brethren only as to the authority by which such measures should be enacted, and as to the validity of the legislation before us. It is conceded in the opinion of the majority that Congress has full control over interstate commerce, and that it is the only authority by which that commerce can be regulated. On the other hand, it is equally clear, as pointed out, that the States may make many police restrictions and provisions which, while indirectly affecting interstate commerce, do not directly regulate it, and the question is whether this particular statute comes within the category of such police regulations.

It must be premised that Southern cattle which are capable of communicating this disease are not necessarily themselves diseased, or their meat unfit for consumption. This is not a mere conjecture, but a well-established fact. In the Report of the Bureau of Animal Industry, for the years 1891 and 1892, which contains the results of investigations into the nature, cause and prevention of cattle fever, it is said, on pages 266 and 267: "The presence of the parasite in Southern cattle does not seem to materially affect their health, although it may maintain a more or less constant breaking up of the red corpuscles on a small scale, which would necessarily tax certain vital organs. . . . From a practical economic standpoint we must maintain that Southern cattle may be healthy and yet be the cause of Texas fever;" and in the final summing up of the conclusions of the investigators, on page 290, it is further stated: "Cattle from the permanently infected territory, though otherwise healthy, carry the microparasite of Texas fever in their blood."

And in the regulations concerning cattle transportation, promulgated by the United States Department of Agriculture on February 26, 1892, as appears from the record in this case, as also in similar regulations issued by the same Department on December 15, 1897, it is provided that within certain speci-

fied dates no cattle are to be transported from below the Federal quarantine line except by rail or boat for immediate slaughter. These cattle are being constantly forwarded by the thousands to the packing houses of this country, and when butchered their meat is shipped all over the world and used with impunity. Statistics found in the cases of *Cotting* v. *Kansas City Stockyards Company* and *Hopkins* v. *United States*, now pending in this court, show that in the year 1896 (and that is but a sample of other years) of something over 1,700,000 head of cattle shipped to the Kansas City stockyards, more than 500,000 came from the territory proscribed by the Kansas statute, and that of these cattle 60 per cent or more were sold to the packing houses there situate for immediate slaughter.

It appears from the report above referred to, that this fever is generally disseminated by means of a tick, technically called *boophilus bovis*, though the jury in this case, in answer to specific questions, found that the fever was communicable otherwise than in that way. The presence of ticks upon the cattle does not necessarily indicate disease. They are purely external, like fleas on a dog, and do not prove that the body is in an unhealthy condition. It may be a curious fact, the cause of which is not yet fully explained, that these cattle range in the South without developing in themselves or communicating to others this Texas fever, while when brought into the temperate zone they seem to communicate it freely and in a most dangerous form. Whatever may be the explanation of this fact does not abridge its significance. Hence it is that these Southern cattle, although they may have ticks upon them, and thus be liable to communicate the disease to Northern cattle, may be entirely free from any disease, their meat a perfectly healthy article of food, and they themselves legitimate subjects of commerce. If they are, when brought into the North, pastured at a distance from native cattle, and the latter are not thereafter permitted to range in the field in which the former have been kept, the disease will not be communicated, the Southern cattle may safely be fattened, and prepared for market and use. It is only when the native

cattle are permitted to pasture in or near the grounds in which the Southern cattle are or have recently been kept that injury results. The case presented, therefore, is not that of legislation to prevent importation of diseased meat — that which in itself is unhealthy and unfit for use — but something which, if improperly or carelessly handled, may communicate disease and do injury. The very phrascology of the statute indicates this. It does not name diseased cattle, but only those liable to communicate disease. If other Northern States follow with like legislation commerce between the two sections of the country in this most important product of portions of the South will be practically interrupted.

The cases referred to in the opinion of the majority in which the police power of the State has been sustained were cases in which the restrictions or regulations only indirectly affected interstate commerce. As, for instance, requiring an engineer to take out a state license, *Smith* v. *Alabama*, 124 U. S. 465; or to be free from and submit to an examination for color blindness, *Nashville & St. Louis Railway* v. *Alabama*, 128 U. S. 96; prescribing the mode of heating passenger cars, *New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628; requiring the prompt delivery of telegraphic messages under condition of a penalty, *Western Union Telegraph* v. *James*, 162 U. S. 650. Nothing of that kind is prescribed by this statute. No inspection is provided for by the State; none required of the carrier; no duty imposed in respect to the handling and care of the cattle while in its possession. It simply prescribes the conditions upon which the carrier may bring cattle into the State, to wit, liability not merely for injury which its own improper handling may cause, but for injury which may result at any time thereafter from any future improper handling by the consignee or subsequent party into whose custody the cattle may pass. It seems to me, beyond any peradventure, that this is legislation directly regulating commerce between the States, and, as such, is within the sole dominion of Congress. It materially affects the conduct of the carrier outside of the limits of the State. And that is one of the tests of invalidity. *Hall* v. *De Cuir*, 95 U. S. 485, 488;

Bowman v. *Chicago & Northwestern Railway*, 125 U. S. 465, 486. Suppose cattle are presented to a carrier in Texas for shipment to Kansas, can it properly refuse to receive and transmit? Can it plead the Kansas statute in defence of its duty as a common carrier? If it says that the cattle have ticks upon them and therefore are liable to communicate Texas fever, or if not having ticks upon them may otherwise (as shown by the verdict of this jury) communicate the disease, the shipper may reply that he intends them for immediate slaughter, and that they are a legitimate article of commerce. But that will not relieve the carrier. The liability imposed by the Kansas statute does not depend upon the intent with which the cattle are shipped into the State; and having delivered them to the consignee, the carrier has no further control. Although shipped with the intention of immediate slaughter, the consignee may change his mind and pasture them in the State. Whatever may have been the intention of the shipment, the liability of the carrier is the same.

I cannot believe that the carrier is thus placed beneath the upper and the nether millstone, liable under the law of Texas to the owner of the cattle if he refuses to ship them, *Bowman* v. *Chicago & Northwestern Railway*, *supra;* and liable to any one in Kansas under the Kansas statute if injuries result from the improper handling by the consignee or others. The presumption of knowledge, which is provided for in section 17, is, in this aspect of the case, entirely immaterial, and does not affect the validity of the statute. Apply the principle of this legislation to other objects than cattle, and see in what it results. Gunpowder, dynamite, many of the drugs used in medicine, while legitimate articles of commerce, and of great value for certain purposes, may, if improperly or carelessly handled, be the means of doing immense injury. Can a State say to a carrier, You may bring gunpowder or any other article of danger into the State, but if you know its dangerous character you shall be responsible for all damages that it may cause in the hands of the consignee or any subsequent party through improper handling? It certainly places it in the power of the State to most materially interfere with inter-

state commerce if it can prescribe that as a condition of its being carried on. The number of articles and the amount of interstate commerce thus subjected to the will of the State can scarcely be overestimated.

It is undoubtedly true that legislation should be had in respect to matters of this kind, but in my judgment such legislation can only come from Congress, and that body, and that body alone, can prescribe the conditions upon which commerce in these cattle can be carried on. Congress has legislated, but only partially, and the fact that its legislation does not go so far as in the judgment of the legislature of Kansas is required, is not, in my opinion, sufficient to warrant the State in enacting this statute. For these reasons, thus briefly stated, I am compelled to dissent from the opinion of the court.